LEGAL SUBMISSIONS ON BEHALF OF: Mr Gary Martin

IN SUPPORT OF: Application for Certificate of Lawful Use or Development

RELATING TO: Garden Land to the North of Pond House, Church Lane, Dogmersfield, Hook, Hampshire RG27 8TA

Graham Cridland

Origin 3 Legal

11 January 2024

1. INTRODUCTION

1.1 These Legal Submissions support an application for a Certificate of Lawfulness submitted to Hart District Council on behalf of Mr Gary Martin, relating to garden land to the North of Pond House, Church Lane, Dogmersfield, Hook, Hampshire, RG27 8TA.

1.2 A previous application seeking a Certificate of Lawfulness for the site as garden land was made to the District Council on behalf of Mr Gary Martin under ref. 20/03099/LDC. That application was refused and a subsequent appeal ref. APP/N1730/X/21/3288009 was dismissed. A copy of the Inspector's Decision Letter dated 14 June 2023 is attached as Document PH1.

1.3 These Legal Submissions and the additional evidence submitted with this Certificate application will address the 'gap' in evidence identified by the Inspector in his Decision Letter, which prevented him from allowing the appeal and granting a Certificate of Lawfulness.

2. THE DECISION LETTER FOR APPEAL REF. APP/N1730/X/21/3288009

2.1 The Inspector addressed the appellant's case in paragraphs 8 to 11 of his Decision Letter. For convenience, these paragraphs are reproduced in full, as follows:

> *8. In matters such as this, the onus is on the appellant to demonstrate on the balance of probabilities that the residential use was lawful and was therefore not liable to enforcement action at the date of the appeal application. My assessment is therefore very fact specific, based upon the evidence before me.*
>
> *9. The thrust of the appellant's case centres on the assertion that the northern land was part of the residential garden of the neighbouring Ormersfield House. Two statements of truth have been made by a former owner. They explain that permission was granted in 1997 for a garage building and that the historic use of this area, which included barns and a granary, was agricultural land. In 2011, planning permission was then granted for the use of that garage as a dwelling, and which is now known as Pond House.*
>
> *10. That agricultural description however only relates to land to the south of Pond House and the former owner highlights they have never made a statement or declaration about the use of the northern land. They however contend in the statements before me that the northern land has not at any time since the purchase of the site in 1969 been used for agriculture.*
>
> *11. It is further stated that the northern land '…was used, kept and enjoyed by us and our family as part of Ormersfield House's garden grounds for over four decades…'. The contention is accordingly that the northern land has been in residential use for a considerable period of time, and that being so, the subsequent severance and transfer to and residential use of part of that land by Pond House would not alter the lawful position.*

2.2 With regard to the use of the 'northern land', it is particularly important to note that the planning permission ref. 97/00434/FUL granted to Robert Glossop on 2 September 1997 for the block of garages that is now Pond House included an approved plan ref. 111.01B, which includes a Block Plan confirming the extent of the application site with a thick line. This plan is included as Exhibit RG3 in Robert Glossop's Statement of Truth dated 26 November 2020, from which it will be seen that the application site includes an extensive area of land around Omersfield House which is indicative of its residential curtilage, and which includes the area of land to the north of what is now Pond House.

2.3 Accordingly, it is clear from planning permission ref. 97/00434/FUL that Robert Glossop regarded – and that the District Council accepted - all the land included within the thick line on the Block Plan incorporated in approved plan ref. 111.01B as being the residential curtilage of Ormersfield House; and that the land to the north of what is now Pond House would not have been included had that not been the case.

2.4 The Inspector then explained what he was required to consider before determining the appeal. At paragraph 12 he said:

> *12. It is therefore necessary to consider the evidence of a residential (garden land) use as it pertains to the northern land of the appeal site to establish whether it was in a lawful residential use* ***prior to its transfer to Pond House*** [emphasis added]. *To this effect, the evidence of the former owner is that it has been tended, maintained and used as such in common with the whole of the land, which is then edged in red on a title plan. This encompasses Ormersfield House and the now Pond House. Aerial photographs are said to demonstrate that the northern land has been mown and maintained to the same standard as Ormersfield House. It is however not possible to adduce from the evidence whether the character of the use was the same, and there are no ground-level photographs to corroborate any assertions.*

2.5 The Inspector assessed the evidence before him at the time in paragraphs 13 and 14 and expressed the opinion that there was a "*lack of evidence*" that the site had been in continuous use as garden land for the relevant period:

> *13. Whilst the northern land has not been in an active agricultural use, certification is not being sought for this, rather, it is sought for residential usage. I accept that drains were installed as the land was wet and boggy, although no date is provided for when the works took place. Flowers were also said to have been planted, although the extent of this and any maintenance involved is also absent. The land was then mown, and a perimeter pathway further cut. The northern land was then considered to have been maintained in common with the other land.*
>
> *14. Despite this, there remains a lack of evidence and/or account of residential activities or paraphernalia on the northern land accordant with a continuous and therefore lawful residential use for a relevant period. This casts considerable doubt in my mind. I recognise that the previous owner has been consistent in his view that the northern land was not in an agricultural use, but this does not demonstrate a lawful residential use in planning terms. The installation of drains, mowing of grass and other explanations provided are not activities exclusive to a residential use, let alone demonstrable of a lawful one for a relevant period.*

2.6 The Inspector also addressed other matters in paragraphs 15 (a restrictive covenant), paragraph 16 (the access track), paragraph 17 (agricultural use) and paragraph 18 (uses between 2013 and 2020).

2.7 The Inspector concluded his analysis in paragraph 19 where he stated:

> *19. It remains the case that the appellant's own evidence needs to be sufficiently precise and unambiguous to justify the grant of a certificate. I accept that the lawful use of residential land is not dependent on an assessment of curtilage and that the severance and transfer of lawful residential garden land from one dwelling to another may not amount to development. However, as a matter of fact and degree, based upon the evidence before me, the appellant has not discharged the necessary burden of proof to demonstrate the lawful residential use of the northern land for a relevant period* ***prior to its transfer*** [to Pond House] [emphasis added] *and that therefore it was not liable to enforcement action.*

2.8 This Certificate application will address the evidential deficiencies identified by the Inspector, providing additional evidence that is sufficiently precise and unambiguous to justify the grant of a Certificate of Lawfulness.

3. LEGISLATION

3.1 This Certificate application is made pursuant to Section 191 of the Town and Country Planning Act 1990 (as amended). Section 191 is set out in full at Schedule 1.

3.2 In accordance with S191(2) uses and operations are lawful at any time if:

- No enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

- They do not constitute a contravention of any of the requirements of any enforcement notice then in force.

3.3 A Lawful Development Certificate under TCPA 1990, s 191 cannot be granted if the LPA is still entitled to take an enforcement action within the statutory time limits for enforcement contained in TCPA 1990, s 171B. For the purposes of this Certificate application, the relevant time limit is ten years - the ten-year period runs from the date on which the breach of planning control was committed and must involve a continuous breach.

3.4 In Ocado[1] (**Appendix 1**) the High Court confirmed the well-known principle that a breach of condition, or material change of use, must be continuous for the relevant ten-year period for immunity from enforcement to be gained. Further, once the lawful use right accrues, its continued existence does not depend on that right continuing to be exercised. This is because the language of TCPA 1990, s 191(2) and (3) makes it plain that the time limit for enforcement may have expired at some point prior to the application date. The Local Planning Authority (LPA) must be satisfied of the lawfulness of the matter in question at the date of the Certificate application, and not that that matter became lawful on that date, so the ten-year period relied on can be sometime in the past and does not have to immediately precede the date of application. Once immunity is gained, the lawful use right can only be lost via abandonment or a supervening event such as a material change of use or the creation of a new planning unit.

3.5 TCPA 1990, ss 191(4), 192(2) place the burden of proof firmly on the applicant to provide sufficient information to satisfy the LPA that the use or operations described in the Certificate application are or would be lawful. This was emphasised in Ocado, where the High Court ruled that an applicant for a Certificate cannot rely upon the LPA or expect it to find information already on its records that may support the application. The evidential standard is 'the balance of probability' (not 'beyond reasonable doubt'); and it is common for legal opinions and/or Statements of Truth to be submitted in support of a Certificate application, to provide an overview of relevant legislation and case law and the factual evidence relating to the lawful planning status of the land.

[1] R (on the application of Ocado Retail Ltd) v Islington London Borough Council [2021] EWHC 1509 (Admin)

4. PLANNING PRACTICE GUIDANCE (PPG) – DETERMINATION OF LDCs

4.1 Although there are no statutory publicity or consultation requirements for Certificate applications in England, the government's Planning Practice Guidance (PPG) advises that it may be reasonable for an LPA to seek evidence from third parties including Parish Councils or neighbours if there is good reason to believe they may possess relevant information about the content of a specific Certificate application.

4.2 The High Court in Ocado expressed the view that it is beneficial to the quality of decision-making on applications under TCPA 1990, s 191 that persons or bodies with relevant information on the grounds for seeking a Certificate should be able to be involved, whether supporting or opposing an application, while recognising that an LPA is unlikely to be able to identify all situations in which members of the public have something material to contribute, either on the decision whether to grant a Certificate or the precise scope of a Certificate.

4.3 The only matter which the LPA can consider is whether the development is lawful (in the case of an application under TCPA 1990, s 191), or would be lawful if instituted or begun at the time of the application (in the case of an application under TCPA 1990, s 192). This is a legal question. The planning merits of the use, operation or activity in the application are not relevant to the LPA's decision. The LPA only needs to consider factual evidence about the history and planning status of the building/land and the interpretation of any relevant legislation or case law.

4.4 In the case of applications for existing use under TCPA 1990, s 191, if the LPA has no evidence itself, nor any from others, to rebut or contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of Certificate on the balance of probability.

4.5 It should be noted that the refusal of a Certificate application only confirms that the matters described in the application have not been proven on the balance of probability to the satisfaction of the LPA, not necessarily that they are unlawful. A subsequent Certificate application can be made if additional evidence can be gathered to support a new Certificate application, which may be successful.

5. CASE LAW AND APPEAL DECISIONS

5.1 A leading court case is *O'Flynn v Secretary of SoS 17/11/2016* (**Appendix 2**) where an Inspector was found to have made an error in refusing to grant a Certificate in respect of land adjoining a dwelling house which the owner had turned into one extensive garden regularly used for normal residential activities by him and his family.

5.2 Mrs Justice Lang held that there had been a failure to properly assess the claimant's use of the site as a place to stroll around, sit out and walk his dogs. An owner's recreational use and enjoyment of a plot of cultivated land in which his dwelling house was situated could amount to a use of the land which was incidental to the residential use. It depended on the facts in the particular case. In the instant case, the claimant was simply enjoying his enlarged garden. It was not in dispute that the land was kept available for use by the claimant and his family at all times: it had no other use.

5.3 In the case, Warwick 5/10/2017 DCS No. 200-006-913 (**Appendix 3**) , the householder won the support of an Inspector and secured a Certificate. The Inspector considered the appellant had over time created a garden encompassing the whole plot in his ownership, placing significance on a consistent mowing regime creating a uniform appearance to all the land. In his conclusions the Inspector observed that creating a garden is not in itself conclusive because the land must also serve occupation of the dwelling in a necessary or useful manner. Regular exercising of a dog taken together with a vegetable patch and use of the land for sitting out and recreational activities had taken place and provided the evidence that, on the balance of probability, the whole of the plot served the dwelling. The Inspector observed the large size of the plot did not alter his overall conclusion, noting the substantial dwelling and generous ancillary buildings, and a countryside location where the size of curtilage was in keeping.

5.4 The new evidence illustrates the uses of the site by the Glossop family. Although the Inspector noted the lack of ground level photographs, stating in paragraph 12 of his Decision Letter that:

"*…Aerial photographs are said to demonstrate that the northern land has been mown and maintained to the same standard as Ormersfield House. It is however not possible to adduce from the evidence whether the character of the use was the same, and there are no ground-level photographs to corroborate any assertions.*"

5.5 The aerial photographs that were submitted in evidence do show a "uniform appearance" of all the land in the original ownership of Ormersfield House, including the site. The additional evidence now submitted points to regular mowing, planting and recreational activities consistent with a garden use. On the balance of probability, therefore, the whole of the land (including the site) owned by Mr & Mrs Glossop with Ormersfield House, served the dwelling. Similar to the Warwick case, the large size of the property's garden (including the site), is in keeping with a substantial dwelling and generous ancillary buildings, in a countryside location.

5.6 Conversely, in another appeal decision, Cotswold 27/12/2013 DCS No. 200-001-451 (**Appendix 4**), claims by the owners of a dwelling in the Cotswolds AONB that they had not changed the use of agricultural land failed, with an Inspector upholding two Enforcement Notices, one of which alleged that the site was being used for residential purposes. During his site visit, the Inspector noted that the site was well maintained with cut grass and pathways, which gave it a strong sense of domesticity due to its managed appearance and strong boundary features which separated it from agricultural land and woodland beyond. In his view, the land had been changed into a residential garden.

5.7 An Inspector also upheld an Enforcement Notice relating to a garden extension in Leicestershire (NW Leicestershire 30/11/09 DCS No. 100-065-679) (**Appendix 5**), finding that growing vegetables and keeping chickens did not amount to agriculture. The Inspector felt that whether the plot was in agricultural or domestic use came down to an individual judgement based on fact and degree and he accepted that it was finely balanced.

5.8 The Appellants argued they were engaged in farming as opposed to merely gardening or something that might be described as a hobby. However, the Inspector remarked that it was not uncommon for domestic gardens to extend to growing vegetables and the keeping of hens and for such activities to be separated from the more recognisably domestic part of the garden. Moreover, the Inspector held that a hobby or lifestyle activity did not change its nature because it was pursued intensively or with a degree of professionalism or technical expertise. The Inspector concluded that the character of the use was that of a domestic garden and that a material change of use had taken place.

6. ANALYSIS

6.1 The Legal Submissions and Statements of Truth from the previous Certificate application ref. 20/03099/LDC and subsequent appeal ref. APP/N1730/X/21/3288009 are included with this new Certificate application.

6.2 In addition to this previous evidence, there are four new Statements of Truth:

- Mrs Emma Esdaile, the daughter of Mr Robert and Mrs Jane Glossop, immediate past owners of Ormersfield House. Mrs Esdaile sets out in her Statement of Truth details of her use and enjoyment of the site when she was a child and living at Ormersfield House. She also includes evidence of the use and enjoyment of the site as an adult and as a mother when visiting her parents with her three children. The use of the site described by Mrs Esdaile is commensurate with a use of garden land.

- Sarah Cocks, a nearby neighbour who provides direct evidence of her understanding of the use of the site as garden land.

- The Applicant, Mr Gary Martin, has added further information about the use of the site whilst developing Pond House, prior to purchasing the property and the site as one from Mr & Mrs Glossop.

- Robert Glossop has added further information about his upkeep of the site between 2013 and 2016 together with the details of his agreement with the Applicant in 2016, including the gift of the ride-on lawn mower to the Applicant.

6.3 Taken together with the evidence previously submitted, this new evidence addresses the lawful use of the site as garden land between 1969 and 2013 (when the site was part of the garden land associated with Ormersfield House – as also noted in the garage application from 1997); between 2013 and 2016 (when the site was separated from Ormersfield House but still owned by Mr & Mrs Glossop with the now Pond House); and from 2016 to the present day, when Pond House was developed by Gary Martin and purchased with the site as one (subject to a restrictive covenant) from Mr & Mrs Glossop.

6.4 The current owners of Ormersfield House, Mr & Mrs Miles, objected to the previous Certificate application ref. 20/03099/LDC. Their evidence relates to the use of the site from 2013 onwards. With regard to the 'gap' in evidence identified by the Inspector who determined appeal ref. APP/N1730/X/21/3288009, Mr & Mrs Miles' objections are irrelevant as they have no knowledge of the use of the site before 2013.

7. CONCLUSIONS

7.1 The additional evidence provided with this new Certificate application addresses the 'gap' in evidence identified by the Inspector who determined appeal ref. APP/N1730/X/21/3288009. Furthermore, these Legal Submissions provide practical guidance, based on case law, as to when Certificate applications should be granted and when use(s) of land do not constitute an agricultural use.

7.2 The evidence that the site has been used as garden land for a period of at least 10 years between 1969 and 2013 is precise and unambiguous. Furthermore, for the period between 1969 and 2013, the District Council has no evidence of its own, or supplied by others, to contradict Mr Glossop's Statements of Truth or that of Mrs Cocks, who has first-hand knowledge of the site's use as garden land.

7.3 The case law and appeal decisions summarised in these Legal Submissions establish that it is correct for the site to be regarded as garden land; and this position is supported by the totality of the evidence provided with this Certificate application, which is sufficiency precise and unambiguous for the District Council to conclude that the site is not agricultural land but was instead being used and enjoyed as part of Ormersfield House's garden for in excess of 40 years.

7.4 The Inspector who determined appeal ref. APP/N1730/X/21/3288009 accepted in paragraph 19 of his Decision Letter that:

"*…the lawful use of residential land is not dependent on an assessment of curtilage and that the severance and transfer of lawful residential garden land from one dwelling to another may not amount to development...*"

7.5 The site's lawful use is garden land and its transfer from Ormersfield House's garden to Pond House's garden does not signify a change of the site's use or an abandonment of the site's use as garden land. Furthermore, and taken together with the evidence previously submitted, the additional evidence submitted with this new Certificate application confirms the lawful use of the site as garden land between 2013 and 2016, when the site was separated from Ormersfield House but still owned by Mr & Mrs Glossop with the now Pond House; and from 2016 to the present day, when Pond House was developed by Gary Martin and purchased with the site as one (subject to a restrictive covenant) from Mr & Mrs Glossop.

APPENDIX 1

R (on the application of Ocado Retail Ltd) v Islington London Borough Council

[2021] EWHC 1509 (Admin)

Queen's Bench Division (Planning Court)

Holgate J

7 June 2021

Judgment

Paul Brown QC (instructed by **Mishcon De Reya LLP**) for the **Claimant**

David Forsdick QC (instructed by **London Borough of Islington Legal Services**) for the **Defendant**

Richard Wald QC (instructed by **Walton & Co**) for the **2nd Interested Party**

The 1st Interested Party was not represented and did not appear

Hearing dates: **05/05/2021 and 06/05/2021**

Approved Judgment

Mr Justice Holgate :

Introduction

1. This claim for judicial review raises some important issues of planning law. How does the 10-year time limit in s.171B(3) of the Town and Country Planning Act 1990 ("TCPA 1990") for the taking of enforcement action apply to a breach of condition in a planning permission? What is the legal nature of the right which accrues when a breach of condition becomes immune from enforcement and lawful under s.191(3)? Does the subsistence of such a right depend upon it continuing to be exercised? What is the scope of the power in s.193(7) of TCPA 1990 to revoke a certificate of lawfulness of an existing use or development (a "CLEUD") granted under s.191?

2. This case has raised some difficult points and at the outset I would like to express my gratitude for the considerable assistance I have received from Mr. Paul Brown QC for the claimant, Ocado Retail Limited ("Ocado"), Mr. David Forsdick QC for the defendant, the London Borough of Islington ("Islington") and Mr. Richard Wald QC for the second interested party, Concerned Residents of Tufnell Park, ("CRTP"), along with their respective teams.

3. The claim relates to 4 units A-D on the Bush Industrial Estate, Station Road, London, N.19. This terrace was built pursuant to a full planning permission dated 17 May 1984, which granted consent for an "industrial building to house British Telecom Power Workshops and an-

cillary buildings for storage, diesel repair and engine-testing, with associated vehicle parking." Condition 3 stated:-

"The Industrial accommodation shall be used as light or general industrial buildings only, as defined in Classes (3) and (4) of the Schedule to the Town and Country Planning (Use Classes) Order 1972 and General Development Order 1977, and shall not be used without planning permission for any other purpose, including warehousing (Class 10)."1

4. The planning application indicated that the premises would provide 5000 sqm of accommodation, including some ancillary office and storage areas. It is unclear whether the permission also authorised the construction of Unit E, lying immediately to the south of Units A to D. This appears to have been used for vehicle maintenance. It was demolished by 5 January 2019 and it is not suggested that it has any significance for the issues now to be determined.

5. Units A-D lie at the north-eastern end of the Bush Industrial Estate. To the south west lies another range of units 1-10, several of which were occupied by BT for a number of years, and units 11-13 in a separate range, occupied for several years by Royal Mail for storage and distribution purposes (class B8 in the Town and Country Planning) (Use Classes) Order 1987 – SI 1987 No. 764) ("UCO 1987").

6. The Industrial Estate occupies a long site oriented from south west to north east. A railway line runs along its long north-western boundary. Employment development and residential properties lie on the other side of that line. To the north east of units A to D there are some three-storey block of flats. To the south east is the Yerbury Primary School, which is attended by about 450 children.

7. It is said that BT was in occupation of Units A-D from the time they were constructed until late 2013. In 2002 the first interested party, Telereal Trillium Limited ("Telereal") acquired much of BT's property estate, including units A to D, which were then leased back to BT.

8. On 27 January 2014 Telereal arranged for the grant of a 10-year lease of units A-D to Royal Mail for use, it is said, as a Parcel Force distribution warehouse. The small extract provided from the lease suggests that there were rights to break the term on *inter alia* 27 January 2017. At all events, Royal Mail did terminate the lease in the early part of 2017. Telereal then marketed the premises for B8 purposes and carried out refurbishment work.

9. In 2018 Telereal entered into negotiations with Ocado for a lease of units A-D. Paragraphs 3 to 5 of the claimant's Statement of Facts and Grounds explain that Ocado was seeking a distribution centre in the Islington area where it could store food at chilled temperatures, process customer orders and organise scheduled deliveries. It was important to the company to be able to find suitable B8 premises from which it could operate 24 hours a day. It was a condition of the negotiations that the premises would have a suitable planning consent allowing for a use, which included B8, a "click and collect" facility and 24 hour use. Telereal said that it would obtain a CLEUD for that purpose.

10. On 15 January 2019 Telereal applied to Islington for a CLEUD certifying that the lawful use of units A to D was for B8, storage and distribution purposes. The application form stated that the use had begun more than 10 years before the date of the application in breach of condition 3 of the 1984 planning permission and said that the use had started in 1992. The application relied upon a statutory declaration dated 12 February 2019 by Mr. Damian Molony, a chartered surveyor, who had some responsibility for the site, first as an employee of BT and then from 2002 as an employee of Telereal. The application also relied upon a covering letter from Telereal's planning consultants, Union 4 Planning, which enclosed some supporting documents. They included a site boundary plan showing the application area edged in red. The area was said to be 1.9ha.2

11. The legislation does not require any public consultation on an application for a CLEUD and none was carried out on this particular application.

12. In summary, the case put on behalf of Telereal to Islington was that BT had used units A-D for B8 purposes from 1992 to 2013, although not to full capacity in the latter part of that period. Between early 2014 and early 2017 Royal Mail leased the premises for warehousing and since then they had been marketed for that same purpose. The application was presented on the basis that units A-D had constituted a single planning unit throughout that entire period and that once the premises had been used for B8 purposes for a 10-year period in breach of condition, the use right thereby obtained had not subsequently been abandoned. On that basis it was contended that it did not matter whether B8 activities had continued to take place physically up until the date on which the application for the CLEUD was made.

13. The application was determined by an officer acting under delegated powers. On 26 April 2019 Islington granted a CLEUD in respect of Units A-D for a B8 use. The accompanying Delegated Report essentially accepted the information and approach presented in Telereal's application.

14. On 4 November 2019 Ocado entered into an agreement for the lease of units A-D relying upon the CLEUD which had been obtained (paragraph 6 of the Statement of Facts and Grounds).

15. On 11 November 2019 Ocado submitted a planning application to Islington for the carrying out of various improvements to the premises. Unlike the application for the CLEUD, this was the subject of consultation with landowners and occupiers in the vicinity. It attracted objections from CRTP. The group comprises a number of members of the public living in the vicinity of the Industrial Estate who are opposed to Ocado's use of units A-D. They became aware of the grant of the CLEUD and took advice on whether it could be challenged.

16. On 23 April 2020 CRTP sent a letter to Islington enclosing a bundle of documents mainly relating to the planning history of the Estate. They asked the local authority to exercise its powers under s.193(7) of the TCPA to revoke the CLEUD on the grounds that Telereal's application had contained statements which had been “false in a material particular” or that “material information” had been “withheld.” The letter carefully explained the particular respects in which the group maintained that those conditions were satisfied.

17. On 1 June 2020 Islington wrote to Ocado and Telereal enclosing the material received from CRTP, stating that there appeared to be grounds for revocation of the CLEUD and giving the recipients an opportunity to make representations on the matter pursuant to article 39(15) of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (SI 2015 No. 595) (“DMPO 2015”).

18. Telereal responded on 25 June 2020 by a letter from its planning consultants enclosing a second statutory declaration by Mr Molony (dated 25 June 2020). That declaration revealed that he had not visited the premises during Royal Mail's lease. Ocado's solicitors also sent a response on the same day, enclosing a Note from the claimant's planning consultants, Gerald Eve. Telereal and Ocado contended that there were no grounds for revocation. Paragraph 1.8 of a Note by Telereal's consultants stated that, in reliance upon the CLEUD, refurbishment and fit out works costing over £2.3m had been carried out, but without any more detail or clarifying who had borne those costs.

19. On 7 August 2020 Islington wrote to Telereal and Gerald Eve responding to points which had been made, stating that the conditions for exercising the power of revocation appeared to be met, but giving one further opportunity for representations to be made. Telereal and Ocado's

solicitors sent separate replies on 20 August 2020. No complaint has been made about the procedure followed by Islington.

20. On 13 October 2020 Islington revoked the CLEUD pursuant to s.193(7) of TCPA 1990. That decision was accompanied by a Delegated Report authorised by the Council's Director of Planning and Development. Relying on decisions in the High Court, *Nicholson v Secretary of State for the Environment* (1998) 76 P&CR 191 and *Ellis v Secretary of State for Communities and Local Government* [2010] 1 P&CR 21, Islington decided that the law required a breach of condition to have continued for at least 10 years up to and including the date of the application for the CLEUD. Even if there had been a continuing use for B8 purposes for a 10-year period ending at some earlier date, any lawful right then acquired had been lost because the occupier did not *continue* thereafter to use the application site for that purpose. Telereal's contention that the lawful use right for B8 purposes had not been *abandoned* was irrelevant to satisfying a legal requirement that the use should *continue* in order for that use right to subsist. As we shall see, the Delegated Report also approached the revocation issue on the alternative basis that Telereal's legal analysis had been correct.

21. On 20 November 2020 Ocado issued its claim for judicial review. Lane J granted permission to apply.

22. If this claim succeeds Ocado will be able to rely on the CLEUD which does not itself contain any conditions restricting the operation of the premises for B8 purposes. There might be an issue as to whether any of the conditions of the 1984 permission other than condition 3 (e.g. the noise level restrictions in condition 7) govern that B8 use accommodated in the building erected under that consent (see e.g. *Lambeth London Borough Council v Secretary of State for Housing Communities and Local Government* [2019] 1 WLR 4317 at [38]). This issue has not been the subject of argument in these proceedings and is not a matter for decision in this judgment. Leaving that point to one side, it would be open to Islington to consider exercising its powers under s.193(7) again, subject to overcoming or avoiding any legal errors identified in this judgment. A reconsideration might involve an examination of additional material. It would not be confined to the information considered so far.

23. If the claim fails, it may be open to Ocado or Telereal to consider making a further application for a CLEUD relying upon more detailed material and addressing criticisms made in the revocation process. If that application were to be refused, an appeal to the Secretary of State could be made under s.195. However, any entitlement to a CLEUD would have to be considered by Islington as at the date of any fresh application, not 15 January 2019.

24. It is appropriate to deal with the issues in this case in the following order:-

Ground 6 was not pursued, but it is convenient to retain the original numbering.

The Statutory Framework.

25. The key provisions are to be found in Part Ⅶ of TCPA 1990 as amended by the Planning and Compensation Act 1991 ("PCA 1991"). The PCA 1991 amended the law on planning control in the light of the report by Robert Carnwath QC (as he then was) "Enforcing Planning Control" (February 1989).

26. Section 171A(1) of TCPA 1990 defines two types of breach of planning control:-

"(a) carrying out development without the required planning permission; or

(b) failing to comply with any condition or limitation subject to which planning permission has been granted."

"Development" without planning permission may involve either a "material change of use" or the carrying out of building, engineering, mining, or other operations ("operational development") (s.55(1)).

27. Section 171A(2) defines the "taking of enforcement action" as including the issuing of an enforcement notice and the service of a breach of condition notice. An enforcement notice may deal with both types of breach of planning control (s.172(1)). It may give rise to an appeal in which planning permission may be granted for the development enforced against or the relevant condition discharged (ss.174(2) and 177(1)). A breach of condition notice under s.187(A) simply secures compliance with conditions which are being breached and does not give rise to any right of appeal.

28. Section 171(B) lays down the time limits for the taking of enforcement action against a breach of planning control, after which no such action may be taken in respect of that breach:-

"(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building engineering mining or other operations in on over or under land no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

(2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.

(3) In the case of any other breach of planning control no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.

(4)……"

29. The time limits for the taking of enforcement action govern challenges to both enforcement and breach of condition notices and the determination of whether a breach of planning control has become lawful for the purposes of a CLEUD under s.191. The test is the same in both contexts (see Sullivan J as he then was in *R (North Devon District Council) v First Secretary of State* [2004] JPL 1396).

30. Thus, if an appeal is brought against an enforcement notice, the appellant may rely upon the ground of appeal in s.172(4)(d) to obtain a decision on whether enforcement action against the breach of planning control alleged is time barred under s.171B (but not otherwise – see s.285(1)). In a prosecution for non-compliance with a breach of condition notice, the notice may be challenged on the grounds that it was time-barred by s.171B (*Dilieto v Ealing London Borough Council* [2000] QB 381).

31. Upon the expiry of a time limit in s.171B for taking enforcement action against either development without planning permission or a breach of condition, the breach of planning control is treated as being lawful at any time, so long as it does not contravene any enforcement notice (or breach of condition notice) then in force. That is the effect of s.191(2) and (3). Although those provisions appear in a section dealing with applications for a CLEUD, they apply equally when determining whether a breach of planning control has become lawful in an appeal against an enforcement notice or in defending a prosecution on a breach of condition notice.

32. Section 191 provides (so far as material):-

"(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful;

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

(3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—

(a) the time for taking enforcement action in respect of the failure has then expired; and

(b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

(3A)……

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5) A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

(7) ……..”

33. Section 191(7) provides that a CLEUD shall be treated as if it were a planning permission for the purpose of *inter alia* the licensing requirements for caravan sited (s.3(3) of the Caravan Sites and Control of Development Act 1960) and for waste management licences (under ss.35-6 of the Environmental Protection Act 1990).

34. Section 192 is a parallel provision enabling a person to apply to a local planning authority for a certificate that a proposed use or operation on land would be lawful (a “CLOPUD”).

35. Section 193 of TCPA 1990 provides:-

“(1) An application for a certificate under section 191 or 192 shall be made in such manner as may be prescribed by a development order and shall include such particulars, and be verified by such evidence, as may be required by such an order or by any directions given under such an order or by the local planning authority.

(2) Provision may be made by a development order for regulating the manner in which applications for certificates under those sections are to be dealt with by local planning authorities.

(3) In particular, such an order may provide for requiring the authority—

(a) to give to any applicant within such time as may be prescribed by the order such notice as may be so prescribed as to the manner in which his application has been dealt with; and

(b) to give to the Secretary of State and to such other persons as may be prescribed by or under the order, such information as may be so prescribed with respect to such applications made to the authority, including information as to the manner in which any application has been dealt with.

(4) A certificate under either of those sections may be issued—

(a) for the whole or part of the land specified in the application; and

(b) where the application specifies two or more uses, operations or other matters, for all of them or some one or more of them;

and shall be in such form as may be prescribed by a development order.

(5) A certificate under section 191 or 192 shall not affect any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted unless that matter is described in the certificate.

(6) In section 69 references to applications for planning permission shall include references to applications for certificates under section 191 or 192.

(7) A local planning authority may revoke a certificate under either of those sections if, on the application for the certificate—

(a) a statement was made or document used which was false in a material particular; or

(b) any material information was withheld.

(8) Provision may be made by a development order for regulating the manner in which certificates may be revoked and the notice to be given of such revocation."

36. Section 194 of TCPA 1990 provides:-

"(1) If any person, for the purpose of procuring a particular decision on an application (whether by himself or another) for the issue of a certificate under section 191 or 192—

(a) knowingly or recklessly makes a statement which is false or misleading in a material particular;

(b) with intent to deceive, uses any document which is false or misleading in a material particular; or

(c) with intent to deceive, withholds any material information,

he shall be guilty of an offence.

(2) A person guilty of an offence under subsection (1) shall be liable—

(a) on summary conviction, to a fine not exceeding the statutory maximum; or

(b) on conviction on indictment, to imprisonment for a term not exceeding two years, or a fine, or both.

(3) Notwithstanding section 127 of the Magistrates' Courts Act 1980, a magistrates' court may try an information in respect of an offence under subsection (1) whenever laid."

37. Section 195 gives an applicant a right of appeal to the Secretary of State against a refusal of an application for a certificate under s.191 (or s.192).

38. In so far as is material, article 39 of the DMPO 2015 provides:-

“(1) An application for a certificate under section 191(1) or 192(1) of the 1990 Act (certificates of lawfulness of existing or proposed use or development)(1) must be made on a form published by the Secretary of State (or on a form substantially to the same effect) and must, in addition to specifying the land and describing the use, operations or other matter in question in accordance with those sections, include the particulars specified or referred to in the form.

(2) An application to which paragraph (1) applies must be accompanied by—

(a) a plan identifying the land to which the application relates drawn to an identified scale and showing the direction of North;

(b) such evidence verifying the information included in the application as the applicant can provide; and

(c) a statement setting out the applicant's interest in the land, the name and address of any other person known to the applicant to have an interest in the land and whether any such other person has been notified of the application.

……

(9) The local planning authority may by notice in writing require the applicant to provide such further information as may be specified to enable them to deal with the application.

…….

(15) Where a local planning authority propose to revoke a certificate issued under section 191 or 192 of the 1990 Act in accordance with section 193(7) of the 1990 Act (certificates under sections 191 and 192: supplementary provisions)(4), they must, before they revoke the certificate, give notice of that proposal to—

(a) the owner of the land affected;

(b) the occupier of the land affected;

(c) any other person who will in their opinion be affected by the revocation; and

(d) in the case of a certificate issued by the Secretary of State under section 195 of the 1990 Act, the Secretary of State.

(16) A notice issued under paragraph (15) must invite the person on whom the notice is served to make representations on the proposal to the authority within 14 days of service of the notice and the authority must not revoke the certificate until all such periods allowed for making representations have expired.

(17) An authority must give written notice of any revocation under section 193(7) of the 1990 Act to every person on whom notice of the proposed revocation was served under paragraph (15).”

39. By s.193(6) of TCPA 1990 an application for a certificate under s.191 (or s. 192) is treated as an application for planning permission for the purposes of the planning register kept by each local planning authority under s.69. Accordingly a copy of each application, the decision on the application and the information required under article 40 of the DMPO 2015 (including that specifically required by article 40(7)) must be contained in the register. The register must be open to public inspection (s.69(8)).

40. However, the legislation does not require a local planning authority to carry out any public consultation on an application under s.191 of the TCPA 1990 (or under s.192). Strangely, that contrasts with the position where the authority refuses to grant a certificate and the applicant appeals to the Secretary of State under s.195. It is common ground that the procedure rules for such appeals, whether dealt with at a public inquiry or hearing, or by written representations, provide for public participation in the process.

41. It is beneficial to the quality of decision-making on s.191 applications, which deal with past events, that persons or bodies with relevant information on the grounds for seeking a CLEUD should be able to be involved, whether supporting or opposing an application. If they are not, there is potentially an increased risk of any certificate granted becoming the subject of an application for judicial review, or revocation under s.193(7), with consequential delays for a landowner wishing to rely upon that decision. If, on the other hand public participation results in the refusal of a CLEUD, the applicant is entitled to pursue the matter on appeal, where the evidence can be examined and tested.

42. It could be said to be unsatisfactory that whether consultation takes place should depend upon the exercise of discretion by individual planning officers, rather than there being a uniform national procedure. Similar concerns were raised by Collins J in *Sumption v London Borough of Greenwich* [2008] 1 P&CR 20 at [8]. The point is illustrated by paragraph 008 of the relevant part of the National Planning Practice Guidance, which states that "it may be reasonable for a local planning authority to seek evidence from other sources e.g., parish councils or neighbours, if there is good reason to believe they may possess relevant information about the content of a specific application". The difficulty is that an authority is unlikely to be able to identify all situations in which members of the public have something material to contribute, either on the decision whether to grant a certificate or the precise scope of any certificate.

Immunity from enforcement action and lawful planning rights.

The position before the Planning and Compensation Act 1991.

43. In order to understand better the current legislation, it is necessary to refer to parts of the previous statutory scheme before it was amended by PCA 1991 This was contained in TCPA 1990 as originally enacted and was something of a hotchpotch.

44. Under s.172(1) a local planning authority could not serve an enforcement notice unless they considered a breach of planning control had occurred after the end of 1963. Section 172(4) reduced that time limit to 4 years from the date of the breach for 4 types of breach of planning control:-

"(4) An enforcement notice which relates to a breach of planning control consisting in—

(a) the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land; or

(b) the failure to comply with any condition or limitation which relates to the carrying out of such operations and subject to which planning permission was granted for the development of that land; or

(c) the making without planning permission of a change of use of any building to use as a single dwellinghouse; or

(d) the failure to comply with a condition which prohibits or has the effect of preventing a change of use of a building to use as a single dwellinghouse,

may be issued only within the period of four years from the date of the breach."

45. Accordingly, breaches of conditions relating to the carrying out of operational development were subject to a 4-year time limit (s.172(4)(b)), whereas those relating to a material change of use were not (unless they fell within the single dwelling category in s.172(4)(d)). Immunity from enforcement could not be obtained for any breach of planning control falling outside s.172(4) unless it was shown that it had continued since the beginning of 1964 down to the date of the enforcement notice. These two alternative time limits were reflected in two of the grounds upon which an appeal against an enforcement notice could be brought under s.174(2)(d) and (e).

46. Section 192 enabled an application to be made for an "established use certificate". Section 191 defined an "established use" as follows:-

" For the purposes of this Part, a use of land is established if—

(a) it was begun before the beginning of 1964 without planning permission and has continued since the end of 1963;

(b) it was begun before the beginning of 1964 under a planning permission granted subject to conditions or limitations, which either have never been complied with or have not been complied with since the end of 1963 ; or

(c) it was begun after the end of 1963 as the result of a change of use not requiring planning permission and there has been, since the end of 1963, no change of use requiring planning permission."

Thus, s.192 certificates could only relate to an existing use of land and not operational development carried out in the past (or breaches of conditions relating to operational development).

47. Furthermore, a use which was shown to have become "established" was only treated as immune from enforcement. It was not treated as a *lawful* use. One consequence of that distinction, was that in the event of an enforcement notice being served the landowner had no right under s.57(4) of TCPA 1990 to revert to the lawful use immediately preceding the use enforced against if it was merely an "established use" (*LTSS Print and Supply Services Limited v Hackney London Borough Council* [1976] QB 663).

48. The Carnwath Report made the following points:-

(i) Prior to the Town and Country Planning Act 1968 there had been a 4-year time limit for enforcement against any breach of planning control. The 1968 Act had introduced a requirement for a landowner to prove that certain breaches of planning control (including a material change of use) had continued since the beginning of 1964. By the end of the 1980s, that period had become far too long to be a sensible basis for immunity. Leaving aside those cases where the 4-year rule should continue to apply, the 1964 rule should be replaced by a "rolling limitation period after which immunity would be conferred" of 10 years (paras. 3.4 to 3.11);

(ii) A breach of control which becomes immune from enforcement should also be treated as lawful (paras. 3.4);

(iii) The procedures for established use certificates and to determine under s.64 TCPA 1990 whether planning permission was required for prospective development, should be replaced by a new, unified procedure. The onus would be on the applicant to make good his case. The authority could refuse to grant a certificate if he failed to do so. The applicant could pursue the

matter on appeal to the Secretary of State or in response to any enforcement action (paras. 7.4 to 7.5).

49. PCA 1991 gave effect to those recommendations by inserting s.171B into TCPA 1990 and by substituting new ss.191-196. There are two important points to be noted about the reforms following the Carnwath Report. First, the Report's recommendation of a "rolling period" of 10 years was to replace the more onerous requirement that a breach of control must have subsisted since 1964, which meant a period already in excess of 25 years and still rising. The "rolling" nature of the time limit simply meant that the landowner would not have to do any more than show that a breach of planning control has existed for a *minimum* period of 10 years prior to the date on which the issue of immunity falls to be determined. It did not mean, as has sometimes been said, that the *only* way of demonstrating immunity was by looking solely at the 10-year period immediately prior to the date of an application for CLEUD or the issuing of an enforcement notice. The 10-year rule might have been satisfied at some point prior to that date. Second, once the 10-year rule is satisfied, the breach of planning control becomes lawful. In other words, a legal right in respect of what had previously amounted to a breach of planning control would accrue. The 10-year time limit for taking enforcement action might have expired at some point in the past, but the Carnwath Report did not suggest that any right which accrued in this manner would be lost merely because it did not continue to be exercised or exercised actively.

The application of the immunity periods after the 1991 Act

50. Section 191(1) enables an application to be made for a CLEUD to determine whether (a) an existing use or (b) an operation which has been carried out (e.g. a building) or (c) a breach of condition, is lawful. Section 191(2) and (3) defines lawfulness in terms of firstly, the time for taking enforcement action having expired under s.171B (or planning permission not being required for an existing use or operations previously carried out), and secondly, there being no contravention of any enforcement notice then in force. If the local planning authority is provided with information satisfying them of the lawfulness of (a), (b), or (c) at the time of the application, then it shall issue a certificate and must describe the use, operation or breach of condition certified as being lawful (s.191(4) and (5)). As we have seen, the same approach to immunity and lawfulness applies where a planning authority serves an enforcement notice ([29] and [31] above).

51. It is well established, and common ground in this case, that in order to be able to show that a use is lawful upon the expiration of a time limit in s.171B(3) it is necessary to show that the use has *continued* for 10 years since it began. The same applies to a breach of planning control in the form of a breach of condition. It is sometimes said that the use must be "continuous", although, as we shall see, care must be taken in the use of that word. The legislation itself does not stipulate that the breach must be a continuing one (see e.g. *North Devon* at [30]). What then, is the legal basis for that requirement and what does it mean?

52. In *Thurrock Borough Council v Secretary of State for the Environment* [2002] J.P.L 1278 the Court of Appeal was concerned with whether the use of land as an airfield had become immune from enforcement. The inspector had said that there was no need for the landowner to demonstrate that the use had been in continuous existence for 10 years. The use had survived throughout that period unless there had been a clear change in circumstances, such as the introduction of another use or the airfield use had been abandoned ([14]).

53. At first instance Newman J held that the rationale for s.171B is that throughout the relevant period of unlawful use the planning authority had had the opportunity to take enforcement action but had failed to do so. If at any time the authority would not have been able to take enforcement action, for example, because no breach was taking place, that period would not count towards the rolling period of 10 years ([15]). The Court of Appeal endorsed that explana-

tion. It is for that reason that the breach of planning control must have *continued* during the immunity period ([25]).

54. The concept of abandonment is applicable to the issue whether a use right which has already accrued continues to exist or has been lost, but cannot apply to the prior issue of *whether* such a right has accrued in the first place. It cannot be used to address any gap in the carrying on of a use during the time period set by s.171B, in effect to supply an assumption that the use *continued* during that period ([26]-[27] and [57]).

55. In *Swale Borough Council v First Secretary of* State [2006] JPL 886 the issue was whether the 4-year immunity period in s.171B(2) was satisfied in relation to a change of use of an agricultural barn to a dwelling. The Court reaffirmed the principle laid down in *Thurrock* that time runs for the purposes of the time limits in s.171B only when the local planning authority is able to take enforcement action, and not when it is unable to do so, notably during periods when a breach has ceased. Just as in *Thurrock* the inspector in this case had erred by relying upon the absence of evidence to show that the residential use had been abandoned during the period before any use right could have accrued, in order to fill a gap in the continuation of that use (see [8]-[11], [25]-[26], [29]-[30] and [35]-[37]).

56. The *North Devon* case was concerned with a breach of condition. Planning permission had been granted for the erection of five holiday bungalows subject to a condition that they should only be occupied for a defined period of 8 months in any calendar year. There was no dispute that one of the bungalows had been occupied continuously for a period of just over 10 years. The Inspector granted a CLEUD on appeal rejecting the local authority's argument that there had only been a breach of condition during the 8-month period in each year and that each such portion of the year when the condition was breached amounted to a separate breach of planning control setting the clock for a 10-year period of immunity running again.

57. Sullivan J upheld the Inspector's decision. He referred to the rationale of s.171B(3) as explained in *Thurrock* and the implicit requirement that the breach of condition should continue for a period of 10 years. Some conditions are capable of being breached continuously. Others are not, such as conditions which do not prohibit or restrict an activity throughout the year but only during certain months, or on certain days (e.g. Sundays and bank holidays) (see [18] to [23]). A “seasonal” or a “time-limited” condition does not give rise to a fresh breach for the purposes of the immunity period each time it is broken. Instead, immunity from enforcement is attained if, throughout a period of 10 years, the condition was breached whenever it was capable of being complied with (disregarding exceptional compliance as a matter of fact and degree). The breach of planning control imposed by the condition would have continued throughout that 10-year period. The practical test in this situation is whether it would have been possible in any year of the 10-year period for the local planning authority to have taken enforcement action in respect of the non-compliance, to which the obvious answer is “yes” ([24]-[25] and [30]).

58. It is plain from *Thurrock, Swale* and *North Devon* that the test of whether the local authority would have been able or entitled to take enforcement action during the immunity period is central to a decision on whether a lawful right has accrued, both in relation to a determination under s.191 or an appeal against an enforcement notice. This principle will help to resolve a major issue between the parties under ground 3 below.

59. *North Devon* also establishes another principle of general importance where a breach of condition becomes lawful under s.191(3). At [26] Sullivan J approved the analysis given in paragraph 8.36 of Circular 10/97. The fact that the circular has since been revoked does not alter the soundness of that analysis. It is based upon s.193(5) which provides that a CLEUD does not affect any failure to comply with a condition subject to which a planning permission has been granted, unless that matter is specified in the certificate. So where a CLEUD is granted because the 10-year immunity period is satisfied in relation to breaches of one of the

conditions in a planning permission, it is the legitimation of *that breach* which should be stated in the CLEUD. The certificate does not legitimise any breaches of other conditions in the permission which are not specified. Those conditions will continue in force unless and until, for example, immunity from enforcement is acquired or a different planning permission (without those conditions) is granted and implemented. Moreover, it may be possible to breach a particular condition in different ways. It is the extent to which a condition is shown to have been breached for 10 years which defines the scope of the accrued right and which should be specified in the certificate, no less and no more. I understand these principles to have become common ground between the parties.

60. The practical importance of these principles is illustrated by an example given by Mr. Brown QC. Suppose permission has been granted for a caravan site subject to a condition restricting the number of pitches to 50. If the landowner can show that there has continued to be 55 pitches on the site for a 10-year period, he is entitled to a CLEUD legitimising the breach of *that condition* to the extent of allowing up to 55 pitches. The immunity from enforcement, and the additional right which accrues, relate to the increase in the total number of pitches on site. The condition cannot be treated as expunged altogether, because that would not correspond to the continuing breach which has been demonstrated and would unjustifiably remove any limit on the number of pitches permitted. In effect, the condition restricting the number of pitches continues in force, but with a revised ceiling on the total number of pitches allowed. There may also be other conditions controlling the pitches on a caravan site, for example their location within the site, which remain unaffected. As s.193(5) plainly states, it is necessary to apply the 10-year time limit to each relevant condition individually.

The procedure for obtaining a CLEUD

61. It is common ground between the parties that the burden lies on an applicant to demonstrate that a breach of planning control has become lawful applying the civil standard (*Gabbitas v Secretary of State for the Environment* [1985] J.P.L 630). This aligns with the principle that in an enforcement notice appeal the burden lies on the appellant to establish to the same standard a ground of appeal falling within, for example, s.174(2)(d) (*Nelsovil Limited v Minister of Housing and Local Government* [1962] 1 WLR 404).

62. Not only must the applicant complete an application in the form published by the Secretary of State, giving the particulars specified, he must also provide “such evidence verifying the information included in the application as the applicant can provide” (article 39(1) and (2) of DMPO 2015).

63. It is only if the applicant provides a local authority with information which satisfies them of the lawfulness of the matter specified in the application that the authority should grant a certificate.

64. If an authority is not satisfied that the information provided to them by an applicant is adequate for that purpose it may refuse the application. The applicant may then appeal against that refusal or may submit a fresh application with more information. Alternatively, the authority may require the applicant to provide further information to enable them to deal with the application (article 39(9) of DMPO 2015). If the authority considers that there may have been a breach of planning control, it may also serve a planning contravention notice under s.171C of TCPA 1990 requiring specified information, including documents, to be provided, which, in the event of non-compliance can give rise to criminal sanctions (*R (Russnak-Johnston) v Reading Magistrates' Court* [2021] 1 WLR 2444).

65. I accept the submission of Mr. Forsdick QC that a local authority is not obliged to exercise its powers to require more information to be provided in order to try and remedy deficiencies in the material submitted by an applicant. The exercise of those powers is a matter of

judgment for the authority. Nonetheless, their availability is important, given that the grant of a CLEUD will constrain the future ability of a planning authority to exercise planning controls, including the taking of enforcement action, and the consequent need to be satisfied with the adequacy of the information presented by an applicant.

66. If an authority should grant a certificate on sparse or materially inadequate information there is a risk of aggrieved citizens applying to challenge that decision by judicial review. This risk is increased by the absence of a statutory requirement for consultation before an application for a CLEUD is determined. It might be argued, for example, that an authority has failed to comply with a *Tameside* obligation to take reasonable steps, in the circumstances of the case, to obtain further information. However, the manner and intensity of any such inquiry may only be challenged on the grounds of irrationality (*R (Khatun) v Newham London Borough Council* [2005] QB 37 at [35] and *R (Balajigari) v Secretary of State for the Home Department* [2019] 1 WLR 4647 at [70]).

67. Care needs to be taken in the drafting of any statutory declaration in support of an application for a certificate under s.191 (or s.192). Such a document is intended to have a formal and solemn status in a non-judicial process where oaths are not administered. It is an offence for a person knowingly and wilfully to make a statutory declaration containing a statement which is false in a material particular (s.5 of the Perjury Act 1911). This offence is "triable either way" and so there is no specific time limit on the bringing of a prosecution. Whether or not a statutory declaration is used to provide evidence to a local planning authority, s.194 makes it an offence for a person, for the purposes of obtaining a decision on an application under s.191 or s.192, to make a statement knowingly or recklessly which is false or misleading in a material particular or, with an intent to deceive, to use any document which is materially false or misleading or to withhold material information. In s.194(3) Parliament has expressly disapplied the normal 6-month time limit in s.127 of the Magistrates' Courts Act 1980 for the bringing of a prosecution in respect of a summary only offence. Section 194(3) is all of a piece with the power of revocation in s.193(7), which is exercisable at any time after the grant of a CLEUD.

68. To enable an authority to assess the weight to be placed upon a statutory declaration or witness statement, it is good practice for the author to make plain which matters are within his own personal knowledge and, unless it is obvious, how that knowledge was obtained. For each matter outside his own knowledge, he should identify the specific source relied upon. These are essentially the principles applied to witness statements in civil litigation (CPR PD32 para.18.2) and it is difficult to see why the approach should be any less rigorous in the context of s.171B where a declaration may be dealing with continuity over a long period of time.

69. An application under s.191 of TCPA 1990 is asking for a certificate to be granted which is intended to provide immunity from subsequent enforcement action inconsistent with the right certified. It would therefore be appropriate in many cases for the applicant to have in mind the type and level of information which would be needed to advance a successful appeal against an enforcement notice under grounds (c) or (d) in s.174(2).

70. At one point Mr. Forsdick QC submitted that the grant of a CLEUD is predicated on the applicant not making any false statement or using any false document or withholding information falling within s.193(7). But he went on to make it clear that he was not contending that this is a condition for the exercise of the power to grant a CLEUD. Otherwise a line of legal challenge to the grant of certificates would arise which could not have been intended by the legislature.

71. Instead, the impact of s.193(7) on the CLEUD process is that an applicant assumes a risk (which passes to or affects successors in title) that any certificate he obtains may be revoked if it turns out that materially inadequate or false information was provided on the application. That risk is likely to be greater if he takes a minimalist approach to the provision of infor-

mation. In practical terms, an applicant takes on responsibility for supplying information to verify his application that will not give rise to action under s.193(7).

72. Because s.193(7) deals with a material withholding of information, it follows that an applicant takes a risk of his certificate being revoked if he withholds material which is adverse to his case. As Mr. Wald QC put it, the legislation implicitly assumes that an applicant seeking a CLEUD is candid with the local planning authority in the information he supplies to verify his application. Where, for example, an applicant has adverse material, he would need to consider carefully whether he could properly justify withholding it. If, for example, it is fatal to the application the obvious answer is "no". Indeed, the application ought not to be made, bearing in mind the criminal sanctions which might apply as well as the risk of revocation. For other adverse information, the appropriate course may well be to disclose the material with an explanation (and any verifying evidence) explaining why it is considered to be non-material to the merits of the application. That after all, is the course which would have to be followed if grounds for revocation arose subsequently. One advantage of disclosure up-front is that the local authority is then able to consider whether it is appropriate to pursue any other lines of enquiry before deciding whether to grant a certificate. Where such steps are taken, it is more likely that any subsequent suggestion of revocation could be resisted more effectively.

73. In many cases the ambit of any certificate and its degree of particularity are likely to be important considerations, because, for example, such matters affect the scope of any enforcement action that may subsequently be taken. Section 193(5) underscores the importance of this issue for breach of condition cases. Ultimately, it is for the local authority to consider the content and degree of particularity in a CLEUD (*R (KP JR Management Company Limited) v Richmond-Upon-Thames London Borough Council* [2018] J.P.L 838). Plainly, this can affect the nature and level of detail which an applicant can be expected to provide in support of an application. A lack of precision in a certificate may sometimes give rise to a successful legal challenge (*Broxbourne Borough Council v Secretary of State for the Environment* [1980] QB 1; *Main v Secretary of State for the Environment, Transport and the Regions* (1999) 79 P&CR 300).

Abandonment of a planning use right

74. In *Hartley v Minister of Housing and Local Government* [1970] 1 QB 413 the Court of Appeal held that the use of a site, for example an established use, could be abandoned, so that its resumption would require planning consent. The Court distinguished a temporary cessation or suspension of a use.

75. By contrast, a planning permission which remains capable of being implemented cannot as a matter of law be abandoned (*Pioneer Aggregates (UK) Limited v Secretary of State for the Environment* [1985] AC 132; *Camden London Borough Council v McDonald's Restaurant*) (1993) 65 P&CR 423. Instead, whether a planning permission lapses altogether is generally controlled by conditions in the permission imposing time limits for the commencement of development (ss.91-93 of the TCPA 1990).

76. In *Secretary of State for the Environment, Transport and the Regions v Hughes* (2000) 80 P&CR 397 the Court of Appeal accepted that abandonment can be assessed by reference to the four criteria applied in *Castell-y-Mynach Estate v Secretary of State for Wales* [1985] JPL 40:-

(i) the physical condition of the property;

(ii) the length of time for which (and extent to which) the property has not been used;

(iii) whether it has been used for any other purposes; and

(iv) the owner's intentions with regard to the use of the property.

Nonetheless, in the final analysis the test is an objective one, based upon the view that would be taken by a reasonable person with knowledge of all the relevant circumstances. The subjective intentions of the actual owner are not determinative.

77. Whereas an established use certificate was conclusive as to the matters it stated in an appeal against an enforcement notice (s.192(4) of TCPA 1990 as originally enacted), the use certified was not treated as lawful. By contrast, under the current version of s.191 a use or breach of planning control found to be immune from enforcement is lawful.

78. Although s.191(6) provides that that lawfulness "shall be conclusively presumed", the Court of Appeal has held that that presumption only applies to the lawfulness certified as at the date of the application for a CLEUD. Consequently, a certified lawful use right is capable of being abandoned subsequently. Such a right may also be lost if an enforcement notice is later served and no appeal is brought against that notice relying upon the CLEUD (*Staffordshire County Council v Challinor* [2008] 1 P&CR 10 at [47]-[48] and [54]-[56]).

79. In the *Swale* case Keene LJ remarked at [30] that the concept of abandonment is best confined to the topic of "established use rights." However, it is plain from [7], [9] and [15] that he was using the expressions "established use rights" and "lawful use rights" interchangeably. That was because the real point in that case was that the concept of abandonment is relevant to whether an accrued use right has been lost, but not to whether it has accrued in the first place (see [54]-[55] above). At all events *Swale* was cited in *Challinor* where the leading judgment was also given by Keene LJ.

80. Accordingly, it is plain that if a lawful right to use units A-D for B8 purposes did accrue in about 2002, through that use having continued in breach of planning control for 10 years, that right was capable of being abandoned thereafter.

The power in s.193(7) to revoke a certificate under s.191 or s.192

81. A CLEUD or a CLOPUD may only be revoked by a local planning authority on the grounds set out in s.193(7). The power of revocation may not be used, for example, because the authority wishes to revisit the merits of the application, or has changed its mind about the findings of fact it has made or the inferences or conclusions it has drawn from the material submitted.

82. The power in s 193(7) may be exercised at any time. It does not give rise to any right to compensation, unlike the making of a revocation order or a discontinuance order under s.97 or s.102 of TCPA 1990 (see ss.107 and 115). A decision to revoke a CLEUD under s.193(7) is not subject to confirmation by the Secretary of State, unlike an order made under s.97 or s.102.

83. It is reasonable to assume that a certificate under s.191 or s.192 is a "possession" for the purposes of Article 1 of the First Protocol to the ECHR. However, Mr. Brown QC confirmed that the grounds of challenge in this case do not rely upon that provision. He accepts that the grant of a CLEUD or a CLOPUD is precarious in the sense that it is liable to be revoked without compensation if the applicant relied upon a statement or document which was materially false, or material information was witheld. The absence of a right to compensation is justified by the nature of the grounds upon which the power in s.193(7) may be exercised. That power of revocation is then subject to judicial review.

84. The first ground upon which a CLEUD may be revoked is that the application relied upon a statement or a document which was false in a material particular. It is common ground that

this ground does not additionally require that the party who made or relied upon the statement or document knew that it was false, or was reckless on that issue. There is no requirement that the making of a statement was deliberately false or dishonest. I agree that section 193(7)(a) lays down a straightforward, objective test that the material in question was false, in the sense of incorrect. Collins J reached the same conclusion in *R (Russman) v London Borough of Hounslow* [2011] EWHC 931 (Admin) at [11].

85. However, there is disagreement on the interpretation of s.193(7)(b). This is the issue raised by ground 1 of the challenge. It is convenient to deal with it now. The claimant submits that the word “withhold” connotes a deliberate decision to hold back information from the local planning authority. Islington and CRTP submit that a withholding does not have to be deliberate.

86. I am in no doubt that the claimant's contention, and ground 1, should be rejected for a number of reasons.

87. According to the Oxford English Dictionary the word “withhold” has a range of meanings. It may indicate a deliberate decision. But it may also describe a situation in which a person keeps something in their possession, such as information. “Keeping” need not be a deliberate act or decision. As a matter of language, it may properly be said that a person withholds information which he or she has in their possession, and therefore is able to provide, but does not provide. Such a withholding may be accidental or inadvertent. It may be mistaken, careless or reckless. For example, the information may be contained in a file which an applicant does not take the trouble to look for. A range of situations may properly be said to fall within the notion of withholding information.

88. The width of the meaning to be given to “withheld” in s.193(7)(b) must depend upon its context. A CLEUD confers an important and valuable right which impacts upon the future exercise of planning control. The local planning authority is entitled to be satisfied with the adequacy of the information provided by the applicant to justify the grant of a certificate. The power to revoke a certificate is an important safeguard for dealing with false information or non-disclosure. It makes no sense for ground (a) in s.193(7) to be an objective test, but for ground (b) to be dependent upon the subjective intention of the applicant. There is no sharp distinction between grounds (a) and (b). They are both concerned to promote reliable decision-making under ss.191 and 192. The positive falsity of a statement may go hand in glove with the non-provision of information. They may relate to the same subject-matter.

89. The objective approach to the meaning of “withheld” in s.193(7) aligns with the onus which the statutory scheme places on the applicant to justify the grant of a certificate by providing adequate evidence to the decision-maker verifying the information included in the application. The subjective approach would undermine the applicant's obligation to verify. It would provide an inappropriate “let out” for an applicant, where it could not be shown that he had withheld information deliberately, but who may have acted carelessly.

90. The procedure applicable under s.193 does not involve any hearing in which the issue of whether an applicant had acted deliberately could be examined by live evidence and tested through cross-examination. This stands in marked contrast to the offence in s.194(1)(c), withholding information with intent to deceive, where the applicant's state of mind can be examined in a hearing before the magistrates' court. Furthermore, a failure to provide information which had a material impact upon the decision to grant a certificate may not be discovered until much later. At that stage it might no longer be practicable to consider the intention or mental state of the applicant when considering the possible use of the power of revocation.

91. I do not accept Mr. Brown's submission that the words with “intent to deceive” in s.194(1)(c) demonstrate that Parliament understood knowledge of the relevant information to

be inherent in the use of the word “withheld” in that provision and in s.193(7)(b). Instead, the objective meaning of “withheld,” which does not require information to be withheld deliberately, is entirely consistent with the specific form of *mens rea* required by Parliament for s.194(1)(c). This is demonstrated by s.194(1)(b), which criminalises the use of a document which is false in a material particular provided that there is an “intent to deceive.” That specific intent is consistent with the test in s.193(7)(a) for the use of a false document being entirely objective. In other words, Parliament's decision to make criminality in s.194(1) dependent upon specific forms of intent does not help in deciding whether the tests in s.193(7)(a) and (b) are either objective or subjective.

92. For all these reasons, ground 1 must be rejected. The withholding of information referred to in s.193(7)(b) need not be deliberate. Islington made no error of law in this respect.

93. Next, I turn to consider the phrases “in a material particular” and “material. This language appears both in s.193(7) and in the offences defined by s.194(1). It also appears in s.5 of the Perjury Act 1911 in relation to false statutory declarations.

94. I accept Mr. Forsdick' s submission that a local planning authority is entitled to consider the materiality of matters falling within s.193(7)(a) and (b) cumulatively as well as individually.

95. To be “material” the information in question must at least be relevant. Relevance is for the court to decide (*Tesco Stores Limited v Secretary of State for the Environment* [1995] 1 WLR 759, 780F). But “materiality” here refers to not only relevance but also significance. As Mr Brown QC rightly accepted, it refers to information the falsity or withholding of which *could*, and not necessarily *would*, have resulted in the application for a CLEUD being refused, or being granted in different terms. It is common ground that Islington applied the “could” test. In my judgment they were correct to do so.

96. I also accept the submission of Mr. Forsdick QC that the materiality test may be satisfied because the relevant information could have resulted in the authority making a different factual finding (or drawing a different inference) to one made previously, or a line of inquiry leading to that outcome, and that could have resulted in the application under s. 191 or s. 192 being determined differently.

97. The words “in a material particular” have frequently been used by Parliament in legislation dealing with false statements and non-disclosure. Relevant case law is helpfully summarised in Archbold 2021 at paras. 28-144 and 28-157, Blackstone Criminal Practice 2021 at para. B14.10, and Halsbury's Laws Vol 26 para. 984. The principles I have set out above are in line with that case law.

98. For example, in *R v Millward* [1985] QB 519 the Court of Appeal endorsed the “could” test and rejected the “would” test. Furthermore, the “materiality” test is to be applied to the *information* which was falsely given or withheld. So it follows that a statement may be materially false because it discourages a relevant line of questioning or inquiry (p.525G).

99. In summary, a local planning authority considering whether to exercise the power of revocation under s.193(7) does not have to be satisfied that if false statements had not been made or information withheld, it would have refused to grant the certificate applied for. One possible basis for the exercise of the power is that the matters in question are “material” because the authority considers that the certificate could have been refused if a line of inquiry had been followed.

100. When a local planning authority determines an application for a CLEUD or a CLOPUD it must act on a correct understanding of relevant legal principles. In other words, it must not misdirect itself as to the law. But beyond that, the application of the law to the circumstances of

the case is a matter for the authority. It will involve assessing the evidence submitted in support of an application for a CLEUD, weighing the material supplied along with any weaknesses or gaps in it, and making findings of fact and drawing inferences from that material. These are matters of judgment for the decision-maker in an evaluative process. The authority's evaluation may only be challenged on *Wednesbury* principles.

101. The same analysis applies to the evaluation by the authority under s.193(7) of false statements or withheld information and their materiality. So, where an authority identifies a false statement or withheld information, the essential legal question is whether its reasoning on why that matter was “material” was rationally incapable of supporting that judgment. In other words, was that reasoning irrational? For this reason, several of Mr Brown's criticisms were expressed in that way.

102. Mr. Brown QC submitted that where an area of doubt or a potential line of inquiry was apparent from the material submitted with the application for a CLEUD, the power in s.193(7) cannot apply where further information becomes available after the grant of a certificate which simply raises the same point or doubt. I do not accept that broad and absolute proposition. At the application stage the applicant only has to satisfy the local authority of the matter to be certified on the balance of probabilities. The local authority may consider, for example, that there is uncertainty on one issue but not to such an extent that further information should be required, or the application refused on the grounds that the applicant had failed to satisfy the civil standard of proof. But if the authority should subsequently discover that information provided with the application was false or other information was withheld, that may increase the uncertainty or doubt on that very same issue to the extent that it is judged that a certificate would not or might not have been issued, for example, without certain questions being raised and investigated. The revocation power in s.193(7) enables that course to be followed if the authority judges that to be appropriate.

103. It is common ground between the parties that s.193(7) cannot be relied upon simply to correct an error of law, for example, an error which was made in the application and was not corrected by the authority before it decided to grant a CLEUD. Instead, that should be dealt with by judicial review, possibly by a self-challenge (*R v Bassetlaw District Council ex parte Oxby* [1998] PCLR 283) subject to CPR 54.5(6). In view of the conclusions I have reached on the grounds of challenge in this case, there is no need for me to decide whether I agree with this point. It should be left to a case where it needs to be determined. Different circumstances and considerations may arise. For example, an error of law by an applicant may lead to the making of a false statement or the withholding of material information without the same error being committed by the decision-maker. It may be arguable that in some circumstances a decision under s.193(7) does not have to adhere to or replicate, in effect, a legal error made in the decision to grant a CLEUD. These may not be straightforward issues.

104. Nevertheless, the grounds on which the power in s.193(7) to revoke is engaged are limited to those set out in paragraphs (a) and (b). Like the initial decision whether to grant a certificate under s.191, the planning merits of the matter in question are not relevant to the decision whether paragraphs (a) or (b) are satisfied.

105. If either paragraph (a) or (b) is met, s.193(7) confers a discretion on the local authority as to whether to revoke a certificate under s.191 or s.192. The authority is not under an obligation to revoke. It “may” do so. The statute does not expressly indicate any factors which must be taken into account in the exercise of that discretion. Nor did the parties contend that the legislation impliedly identified any factors which must be taken into account, at least not in the circumstances of the present case.

106. Accordingly, the position in law is that the local planning authority may have regard to other relevant factors in so far as it considers it appropriate to do so. Where it is shown that an

authority did not take a particular consideration into account, that will not give rise to an error of law unless the consideration was "so obviously material" that it was irrational in the *Wednesbury* sense not to have taken it into account. The mere fact that a decision-maker did not advert to a particular consideration does not render its decision unlawful, unless it was irrational not to have taken it into account in the circumstances of the case:-

"There is no obligation on a decision-maker to work through every consideration which might conceivably be regarded as potentially relevant to the decision they have to take and positively decide to discount it in the exercise of their discretion."

(see the decision of the Supreme Court in *R (Friends of the Earth Limited) v Secretary of State for Transport* [2021] PTSR 190 at [116] – [121]).

107. By way of example, the local planning authority might take into account the effect of revoking the certificate on affected landowners, particularly if time has elapsed and successors in title demonstrate the harm they would suffer. In that event, it could also be relevant to consider whether a successor in title was involved in, or aware of, the application for a certificate, particularly if it intended to rely upon any certificate granted. Where a local authority has reason to conclude that material information was *deliberately* withheld at the application stage, or that there has been material concealment of information after the certificate was issued, those matters could be taken into account as weighing in favour of revocation. Although the planning merits of a development or a legitimised breach of condition are irrelevant to whether sub-paragraphs (a) or (b) of s.193(7) are satisfied, a local authority may have regard to that aspect when exercising its discretion whether to revoke a certificate. But it is entirely a matter for the authority whether to consider planning benefits or harm at all and, if so, to what extent, subject only to review on the grounds of irrationality.

108. There is no statutory requirement for reasons to be given for a decision to revoke a certificate under s.191 or s.192. However, it is common ground between the parties, and I agree, that a local planning authority has a common law obligation to give reasons for such a decision. Ocado does not contend that Islington failed to satisfy that requirement in this case.

The application for the CLEUD

109. Telereal's application form seeking a CLEUD stated that it related to an existing use in breach of condition falling within Use Class B8. It stated that the use began on 1 January 1992 and had not been interrupted since then, and that there had been no material change in the use of the property. The application form relied upon a covering letter from Telereal's consultants, Union4Planning. That letter submitted a brief analysis of the planning history of the Industrial Estate and commented on certain documents (including a short extract from Royal Mail's lease in 2014, a marketing brochure in 2017, and extracts from the 2010 and 2017 Valuation Lists maintained by the Valuation Office Agency).

110. The planning consultants did not purport to give any evidence about the way in which units A-D had been used over the years. They did not claim to have any knowledge of that subject. Instead, they commented on the documents presented. The consultants said that Appendix 1 to their letter contained "the full planning history" for the estate as far as could be ascertained from Islington's planning register. They stated that most of the planning history concerned units 1 to 13 and was not relevant to units A-D, save that some of the planning applications had described the use of those units. The letter referred to permissions in 1997 and 2000 for B8 use in units 9 to 13 and a permission in 1985 for an open storage use to the rear of units 3 to 10. Whilst those permissions did not relate to units A-D, they did indicate "the prevalence of B8 uses within the estate." The letter also mentioned two applications, one in 2010 and the other in 2011, which proposed an increase in the area used for open storage and the erection of an indoor tennis court. The consultants said that the Design and Access Statement for the

2010 application had referred to “the underused nature of the surrounding B8 units. In relation to the 2011 application they said that “the applicant importantly confirmed that the major warehousing building on the site is units A to D, but that these are not being used to capacity.” The letter did not give any further detail on these matters.

111. Turning to the history of units A to D, the letter from the consultants relied upon the first statutory declaration of Mr. Molony. On the basis of that document the consultants asserted that units A-D had been in use for B8 purposes “since at least 1992”:-

“During the period from 1992 to 2013, during which the building was controlled by BT and then by Telereal Trillium, the building was *fully operational* as a warehousing/storage depot with ancillary offices (class B8). The building was primarily used as stores for field engineers with ancillary office areas.” (emphasis added).

The letter relied upon the photographs of the interior of units A-D “from February 2006”. The letter then referred to the grant of the Royal Mail lease in January 2014 and the termination of that lease in Spring 2017. Nothing was said about the extent to which, if at all, Royal Mail physically used units A-D.

112. The consultants submitted that the building had been occupied as a whole and treated as a single planning unit. They claimed that a class B8 use of the building had been acquired “as a result of continuous and uninterrupted occupation of the building for storage and distribution use for a period exceeding 10 years.” They contended that that use right had not subsequently been lost by abandonment, replacement by a different use, or extinguishment following the formation of a new planning unit. In this context, Telereal relied upon the decision of the High Court in *Panton and Farmer v Secretary of State for the Environment, Transport and the Regions* (1999) 78 P&CR 186.

113. Thus, there is no dispute that Mr. Molony's declaration was the key document relied upon to “verify” the claim that a B8 use right had accrued by 10 years' continuous and uninterrupted use in breach of planning control and had not subsequently been abandoned. But although he was addressing the occupation of 5000m2 of floorspace during a period of just over 37 years, the document amounted essentially to no more than one page of text.

114. Mr. Brown QC confirmed that the claim to a continuing use for B8 purposes began on 1 January 1992 because that was when Mr. Molony first became “responsible” for the site and “familiar” with it (paras. 5 and 7 of the declaration). He explained that he had been employed by BT as a chartered surveyor between 1991 and 2002 and then when in 2002 Telereal acquired the majority of BT's estate, including the site, his employment was transferred to Telereal. He said that he continued to be “responsible” for the site from 2002 to the date of the declaration, 12 February 2019. But he gave no details on the nature and extent of his involvement with the site over that 37 year period.

115. Mr. Molony's statutory declaration made the following additional points:-

(i) The declaration was made from his own knowledge and the information provided was complete and accurate (para.1);

(ii) Units A-D comprise “four interlinked warehouse units with ancillary offices” (para.4);

(iii) Between 1992 and 2002 Mr. Molony had “direct responsibility” for the rationalisation and consolidation of BT's operations in units A-D and was involved in relocating operations from the adjoining leasehold units occupied by BT (para.7);

(iv) In 1992 units A-D were “already fully operational as a warehousing storage depot” (para.7);

(v) Since at least 1992 “the whole of [units A-D] was in use as a warehousing/storage (class B8) depot with ancillary offices and, as far as I am aware, this use has been continuous throughout. The site was primarily used for stores for field engineers with ancillary office areas.” He produced photographs taken in 2006 “which are typical of the uses which were” (sic) (para.8);

(vi) In December 2013 BT vacated the site and a new 10-year lease was granted to Royal Mail in January 2014 for a distribution warehouse. The lease was terminated in 2017, since when units A-D have been marketed as “an industrial warehouse” and were being refurbished (para.9);

(vii) “I dispose (sic) of the above information from my own knowledge of the use of the buildings and the site generally” (para.10).

116. Thus, the key information provided by Mr. Molony was said to be based solely upon his own personal knowledge and without relying on other sources. The declaration gave the clear impression that he was able to speak to the entire period between 1992 and February 2019. It also gave the clear impression that the premises had been used physically for B8 purposes continuously throughout the whole period from 1992 to 2017. I also note that the covering letter said that during the period 1992 to 2013 the building “was fully operational as a warehousing/storage depot with ancillary offices.” The declaration did not address the subject of whether the whole or any part of units A-D was vacant at any time. It did not suggest that any B8 use right continued to subsist because there had been no abandonment of that right. No evidence was provided in the declaration addressing any of the four criteria on abandonment set out in [76] above. Instead, the covering letter from the planning consultants asserted that there had been no abandonment of B8 use rights, but without any supporting evidence.

117. The approach taken in this case to the provision of verifying evidence in support of the application for a CLEUD can only be described as minimalist. Even if that application were to be approved, there was plainly a substantial risk of revocation in the event of information coming to light which engaged s.193(7).

118. Mr. Molony's second statutory declaration dated 25 June 2020 stated that:-

(i) Units C and D were marketed for subletting from 2006 whilst units A and B were being used for storage;

(ii) In response to a suggestion by local residents that Royal Mail did not use units A-D during the period 2014 to 2017, Mr. Molony said that he had not inspected the premises during that period;

(iii) No evidence was given, for example information obtained from Royal Mail, about the extent to which they actually used units A-D.

119. Given the nature of the grounds of challenge, it is unnecessary in this judgment to summarise at this stage the representations sent to Islington by Ocado and Telereal in 2020. The challenge relates essentially to the approach taken in the Delegated Report dated 13 October 2020.

120. The Report correctly stated that s.193(7)(b) does not require material information to have been withheld deliberately (para.4).

121. The Report identified what Islington considered to have been material false statements and withholding of information, which may be summarised as follows:-

(i) Telereal's application had relied on units A-D as “four interlinked units” forming a single planning unit, without mentioning a lack of interconnection between units B and C (paras. 11, 13 and 19);

(ii) Telereal had not referred to a statement in the 2011 planning application that units C-D were unused at that time and, being surplus to requirements, had been marketed since 2006 as a separate unit. Telereal had not produced photographs taken in 2011 showing the empty units. This information contrasted with the false statement in the application that between 1992 and 2013 units A-D had been fully operational as a warehouse and also with the reliance placed upon photographs taken in 2006 produced by Mr. Molony. This was not a case where units had simply not been used to capacity (paras. 11, 17 and 18);

(iii) The statutory declaration had been false in stating that since 1992 the whole site had been in use as a warehousing/storage depot, that the use had been continuous throughout, and that the photographs submitted were “typical of the uses” (para. 18);

(iv) The statutory declaration had withheld the fact that Mr. Molony, who was professing to give first-hand evidence, had not visited the site during Royal Mail's lease3 and so could not attest to its use during that period (para.18);

(v) The application had failed to refer to Royal Mail ceasing to use the premises by, at the latest, 2015 (paras. 11 and 17);

(vi) The application and the decision in 2019 had proceeded on the incorrect legal basis that the issue was whether there had been a 10-year period of continuous use in breach of condition at any time in the past, without that lawful use being subsequently abandoned or suspended. Instead, the law had been correctly stated in *Ellis* (para.22). In any event, even applying “the wrong legal tests” relied upon by Telereal, the applicant had been required to provide an accurate factual account of the use over time. The false statements and withholding of information were still material to that issue (para.23);

(vii) The false assertion about the interlinked nature of units A-D, as well as the lack of use and the separate marketing of units C and D, were relevant to the identification of the correct planning unit (para.28);

(viii) On the exercise of the discretion to revoke the CLEUD, the legislation assumes the provision of “correct and complete material information.” Had the false statements not been made and/or material information withheld, Islington “would have been alerted to the need to carry out further investigations in particular as to the planning unit” and “could have come to a different decision” (para.8).

122. It was common ground between the parties that the officer's report should be read with “reasonable benevolence” and not with “undue rigour” (*R (Mansell) v Tonbridge and Malling Borough Council* [2019] PTSR 1452 at [42], [62] and [64]).

Summary of the grounds of challenge

123. In summary, Ocado advances the following grounds of challenge:-

1. Islington erred in law by deciding that s.193(7)(b) of TCPA 1990 does not require a withholding of material information to have been deliberate;

3. Islington erred in law by proceeding on the basis that an accrued right relating to a breach of planning condition legitimised by s.191(3) is lost if that right does not continue to be exercised;

2. Islington's conclusion that false statements had been made, or material information withheld, was inconsistent with its acceptance that those statements (or omissions) had been made on the legal basis set out in the application. Viewed in that way it could not be said that any such statements were false or that any material information had been withheld;

4. Islington erred in law in concluding that the false statements and withheld information they identified were material to the correct identification of the planning unit for the site to which the s.191 application related;

5. Islington erred in law in concluding that the false statements and withheld information they identified were material to whether the B8 use had been abandoned;

7. In exercising its discretion as to whether to make the revocation order Islington failed to take into account material considerations.

Ground 1

124. For the reasons given in [84]-[92] above, ground 1 must be rejected. Section 193(7)(b) does not require the withholding of material information to have been deliberate.

Ground 3

125. Islington reached its decision to revoke the CLEUD on the basis that where a breach of planning condition becomes lawful after 10 years by virtue of s.191(3), the right which thereby accrues is lost if it does not continue to be exercised. Ocado submits that the mere fact that such a right is not exercised for a time does not result in it ceasing to subsist. Something more than that would be required for the right to be lost, such as abandonment.

126. It is necessary to put the parties' submissions into context. Three scenarios should be considered where a breach of planning control becomes lawful, and so a right accrues by virtue of section 191(2) or (3): (1) development without planning permission (i.e. a material change of use or operational development) which does not also constitute a breach of condition; (2) a breach of condition which does *not* also constitute development without planning permission; and (3) a breach of condition which *does* also constitute development without planning permission.

127. As to these three scenarios, Islington, supported by IP2, submits that:-

(1) In scenario (1) once the relevant immunity period in s.171B for development without permission is satisfied at any time before enforcement action is taken or a s.191 application is made, that development becomes lawful. The right which then accrues is not lost thereafter merely if it ceases to be exercised for a time. Cessation of use would not result in the right being lost unless there was sufficient evidence to show that it had also been abandoned;

(2) In scenario (2) the breach of condition must continue for at least 10 years and thereafter must continue until the date when enforcement action is taken or a s.191 application is made. Once a breach of condition becomes lawful by satisfying s.191(3), the right which then accrues only exists for so long as it continues to be exercised, or, in other words, for so long as that former breach continues. It follows that such a right may be lost through mere cessation not amounting to abandonment;

(3) In scenario (3), either the rules in scenario (1) or the rules in scenario (2) apply according to whether a s.191 application made by a landowner or an enforcement notice served by a local authority is directed at development without planning permission or alternatively a breach of

condition. Accordingly, Mr. Forsdick QC had to accept that even if a landowner obtains a CLEUD expressed as a change of use, where that use also involves a breach of condition, the use right conferred by the certificate can be defeated by the subsequent service of an enforcement notice alleging a breach of that condition, merely because the use has ceased for a period even though the right certified has not been abandoned.

Ocado agrees with scenario (1) but says in relation to scenarios (2) and (3) that an accrued right based upon a breach of condition does not come to an end merely because that right is not exercised for a time.

128. It should be noted that the parties have proceeded on the basis that the s.191 application and the CLEUD granted by Islington related to a use in breach of condition.

129. It can be seen straightaway that, according to Islington's analysis, the right which accrues in scenario (2) by virtue of s.191(3) is of a very different nature to the right which accrues in scenario (1) by virtue of s.191(2). A “use it or lose it” principle is said to apply in scenario (2), but not in scenario (1). The distinction in Islington's analysis is illogical, not least because an accrued right would be stronger and more durable where it derives from a failure to obtain any planning permission at all, as compared with a situation where a planning permission was obtained but the only breach of planning control is a breach of condition. Islington's analysis of scenario (3) is even more odd. Mr. Forsdick QC was unable to provide any rationale for the illogical consequences that would result from Islington's analysis of the law. He said that that they were just the inevitable result of the distinction which Islington says the law requires to be drawn between scenarios (1) and (2).

130. It is helpful to begin by returning to *Thurrock* where Schiemann LJ explained at [25] that the rationale for the time limits in s.171B is that once they have expired the local planning authority has lost the chance to take enforcement action in respect of that breach. Section 171B expressly prohibits the taking of enforcement action. Subsection (3) does so in relation to cases involving either a material change of use or a breach of condition without distinction. Schiemann LJ also drew an analogy with a landowner who has allowed the public to walk regularly along a path over his land and after a time loses the right to object. Similarly, in private law an easement such as a right of way may be acquired by prescription. But once such a right has accrued, it is not lost by mere non-user. It must be shown that the right has been abandoned (see *Megarry & Wade: The Law of Real Property* (*9th edition*) paras. 28-009 to 28-010).

131. Mr. Forsdick QC rightly accepted that the correctness of Islington's analysis depends on whether it is justified by the nature of the right which accrues under s.191(3) or by the wording of the legislation. In fact his submission on the nature of the right depends on the way in which that right is acquired. In addition, Mr. Forsdick QC relied upon the decisions in *Nicholson* and *Ellis*. It is common ground that these are the only authorities deciding the issue under ground (3). Although they are not binding on me, I should only depart from them if satisfied that there is a powerful reason to do so or that they are clearly wrong (*Willers v Joyce* (No.2) [2018] AC 843 at [9]).

132. I turn to the nature of the right which accrues under s.191 and with the breach of planning control from which it derives. The key principle upon which the decisions in *Thurrock, Swale* and *North Devon* are based is that time does not run for the purposes of s.171B during periods when the local planning authority would be unable to take enforcement action because the breach of planning control has ceased. It is for that reason that a breach of planning control must continue throughout the immunity period. If, for example, a breach of condition ceases the clock stops. If the condition is breached again a fresh breach of planning control occurs and the clock starts all over again (*Nicholson*). This requirement of continuity is not explicitly stated in the legislation; it is a judicial principle (see [51]-[58] above).

133. Some conditions require only intermittent, rather than continuous, compliance. But the same principle applies. During periods when the control imposed by such a condition does not apply, it would be incorrect to say that any previous breach of condition has ceased, or that there is compliance with the condition. For the purposes of gaining immunity from enforcement action, it suffices that the breach occurs throughout the part (or parts) of the year when the control applies. The local authority “continues” to be able to take enforcement action throughout the year in respect of periods when an intermittent control does bite and is breached; the clock carries on running.

134. It is plain that the application of this requirement of continuity does not differ between a breach of planning control based upon a material change of use and one based upon breach of a condition prohibiting that use. If in either case the use ceases or is interrupted during the immunity period, time ceases to run and if the use recommences a fresh breach of planning control occurs (see e.g. *Thurrock* and *Swale*). So, contrary to Islington's case, there is no difference in the way in which the continuity requirement applies to these types of planning control so as to justify the difference in the nature of the accrued right for which they contend.

135. More fundamentally, Islington's argument involves flawed logic. The continuity requirement simply determines whether time is running for the purposes of s.171B and the requisite period for immunity is achieved. It is based upon the notion that time only runs when the planning authority is able to take enforcement action. But once the relevant time limit in s.171B expires the question of whether the authority would be able to take enforcement action is completely irrelevant. The taking of enforcement action is prohibited by the legislation itself and not by any principle that such action cannot be taken when a breach has ceased. The continuity principle is defunct so far as that former breach of planning control is concerned. There is therefore no reason why this judicial principle should govern the entitlement to enjoy the right which has accrued. Once the immunity period for a breach of planning control is satisfied, it is the time bar in s.171B which prevents any enforcement action being taken thereafter, irrespective of whether what was formerly a breach of planning control continues.

136. As we have seen, *Thurrock* established that the concept of abandonment is irrelevant to whether a use right has accrued under s.191(2). But the Court also endorsed the view that abandonment, and not mere cessation of use, is relevant to determining whether an accrued right is lost ([26] and [56]). There is nothing in the principles by which breaches of planning control *become lawful* which could justify drawing a distinction between breaches of condition and development without permission when it comes to considering how such accrued rights may be *lost*.

137. Mr. Forsdick QC sought to justify Islington's stance by pointing to differences of language in the legislation in the treatment of development without permission as compared with breaches of condition. In summary, he points to the fact that changes of use and operations are dealt with in s.191(2), whereas breaches of condition are dealt with separately in s.191(3). The former are referred to by language using the plural, whereas the language dealing with the latter is in the singular. As I understood the argument, the use of the singular for a breach of condition is said to reflect the separate breach which occurs each time there is an interruption in the activity prohibited.

138. In my judgment, this submission adds nothing to the arguments already considered above. First, changes of use and operations are dealt with separately in s.191(2) because there are two grounds upon which such development may be lawful in addition to the expiration of a time limit in s.171B, namely they do not involve development or if they do, they do not require planning permission (s.191(2)(a)). Those grounds cannot apply to breaches of condition. Second, because the same criteria apply to uses and operations the draftsman has dealt with them in one subsection rather than two, to avoid unnecessary repetition. Consequently, the plural had to be used in s.191(2). Moreover, s.191(2) is a classic example of a statutory provision

where the plural must be read as including the singular. Section 191(3) only deals with one type of breach of development control and so there the singular had to be used. In any event, the singular is used in s.191(1)(a), when dealing with a use of land, just as in s.191(1)(c) when dealing with a breach of condition. There is no material difference.

139. Initially, Islington submitted that a breach of condition is not lawful unless it is shown that the breach has continued during the 10-year period expiring on the date when an enforcement notice is issued or the date when an application for a CLEUD is made, and not during any earlier 10-year period. During argument Islington modified that stance by accepting that the 10-year requirement could be satisfied during an earlier period, but the right which would have then accrued must continue to be exercised down to the date of an enforcement notice or application for a CLEUD. In my judgment neither version of Islington's submission is consistent with the statutory language.

140. Section 191(4) applies to the certification of all types of lawfulness falling within s.191, whether a use, an operation or a breach of condition. It requires the authority to be satisfied of *the lawfulness* of the matter in question at the date of the application for a CLEUD, and not that that matter *became lawful* on that date. Sections 191(2) and (3) declare that any use, operation or breach of condition is lawful *at any time* if the time for enforcement action had *then* expired. That language makes it plain that the time limit for enforcement may have expired at some point prior to the application date or the issuing of an enforcement notice. That approach aligns with the language in s.171B that “no enforcement action may be taken *after* the end of” the relevant time limit. What the legislation does not do is to define the nature of any of the rights which may accrue under s.191(2) or (3) by the expiration of a time limit in s.171B by reference to the manner in which those time limits are satisfied.

141. Lastly, I turn to the case law to which the parties have referred. *Nicholson* was concerned with a refusal of a CLEUD relating to non-compliance with an agricultural occupancy condition in a permission for a dwelling. For 15 years the property was occupied in compliance with the condition. Then it was unoccupied for 7 years before being occupied in breach of the condition for the next 7 years. For the following 4 years leading up to the date of the application for the CLEUD the house was unoccupied while extensive works were carried out. Mr. Robin Purchas QC (sitting as a Deputy High Court Judge) rejected the claimant's argument that it sufficed for her merely to show that the breach had occurred more than 10 years before the date of the application. It is highly pertinent that because the breach of condition had ceased after 7 years, the 10-year time limit had never been satisfied. That in itself was fatal to the claim. The breach had not continued for at least 10 years (p197). The judge accepted that straightforward point at p.200 (see Sullivan J in *North Devon* at [16]).

142. The judge also held that the concept of whether a planning use is or is not abandoned was irrelevant to deciding whether a breach of condition had continued for the requisite period (p. 198). No doubt that point had arisen in relation to the 4-year refurbishment period (see p.193). The judge's observation is consistent with the subsequent decisions in *Thurrock* and *Swale* that it is irrelevant to whether a use has continued throughout the appropriate immunity period to say that it was not abandoned during that time (see [54]-[55] above). It was unnecessary for the Court to go any further in *Nicholson*.

143. However, the judge did go on to hold that the relevant breach of condition had to subsist not only during the 10-year immunity period but also at the date of the application for a CLEUD. He equated the issue under s. 191(1)(c) as to whether any matter relating to a failure to comply with a condition is lawful to the provisions in s.191(a) and (b) which are also expressed in the present tense. But s.191(1) does not define lawfulness. That is left to s.191(2) and (3) where it is crucial to note that a use, operation or breach is declared to be lawful “at any time” and not simply by reference to the date when an application for a CLEUD happens to be made. The problem is that the judgment in *Nicolson* did not consider the nature of the rights

which accrue and continue once a time limit in s.171B has expired. That issue did not arise in *Nicholson* and so it was not argued before the judge, as it has been very fully in the present case.

144. This difficulty can also be seen at p.199 where the judge said that the effect of s.191(1)(a) is that "the *use* must exist at the time of the application" (emphasis added). In my judgment that statement is only accurate if the word "use" is understood as referring to a "use right", whether or not any physical use pursuant to that right is taking place at the time. In this context it is preferable to use the term "use right" rather than the shorthand "use" to avoid confusion. As Keene LJ said in *Swale* at [7], where the necessary period of user can be shown under s.171B the land in question enjoys "lawful use rights". It is those rights, in other words "lawfulness", which must presently subsist at the date of the application, not a breach of planning control. The two concepts should not be elided. On this important point the legislation does not distinguish between a use, an operation or a breach of condition.

145. The judge then suggested that s.191(2)(b) and s.191(3)(b) pre-suppose that there must continue to be something capable of amounting to a breach of planning control at the date when lawfulness is being considered if there was in fact a relevant enforcement notice then in force.

146. With respect, I am unable to agree with this analysis of the legislation. First, the approach taken in *Nicholson* to s.191(2)(b) is inconsistent with the established principle that an accrued lawful use right subsists during periods when the land is not being actively used unless it is abandoned. Second, section 191(2)(b) and s.191(3)(b) apply equally to uses, operations and breaches of conditions without drawing any material distinction between them. Third, they operate by making it clear that a lawful right does *not accrue* upon the expiration of a time limit in s.171B for taking enforcement action if the use, operation, or breach of condition in question contravenes *the requirements* of an enforcement notice then *in force*. In other words, Parliament did not wish an *extant* enforcement notice (or breach of condition notice) to be negated by the subsequent application of a time limit in s.171B to something which contravened the requirements of that notice. The position would be different if at the time the relevant period in s.171B expired the notice had ceased to be in force, e.g. because it had been withdrawn (s.173A of TCPA 1990) or quashed. Fourth, if both limbs (a) and (b) in s.191(3) are satisfied, then the "matter constituting a failure to comply" with a condition is declared to be lawful "at any time". That matter is not lawful simply at the point when the time limit in s171B expires. Accordingly, contrary to the suggestion in *Nicholson*, these provisions do not imply that there must be a continuing breach of planning control *after* the expiry of the time limit in s.171B for taking further enforcement action.

147. For these reasons, I do not consider *Nicholson* to be an authority which assists on the issue to be decided under ground 3.

148. *Panton* decided that a lawful use right which has accrued for the purposes of s.191 may only be lost by operation of law, whether by abandonment, the formation of a new planning unit or by a material change of use, or by a discontinuance order (p.193). Unlike *Nicholson, Panton* was not concerned with the legal requirements for a breach of planning control to *become* immune from enforcement and lawful. Instead, *Panton* was concerned with whether an *accrued* lawful use right still subsisted. The decision supports the analysis in scenario (1) (see [127(1)] above). But it did not consider the nature of an accrued right arising from a breach of condition and on what basis it may continue to exist. *Panton* does not assist on the issue I have to decide under ground 3.

149. *Ellis*, like *Nicholson*, was also concerned with an agricultural occupancy condition in a planning permission for the erection of a dwelling. Unlike *Nicholson*, the condition had been breached for well over 10 years, in fact for 39 years between 1961 and 2000. An application for

a CLEUD was made in March 2007. Between 2000 and 2007 the cottage was occupied for two periods amounting to nearly 5 years in total, but was otherwise unoccupied. At the time the application was made the dwelling was also unoccupied ([3]-[4]).

150. Mr. Rabinder Singh QC sitting as a Deputy High Court Judge (as he then was), accepted that immunity from enforcement had been acquired on four different bases prior to the application for a CLEUD ([27], [32], [35], and [38]). Plainly a right to occupy the dwelling without complying with the agricultural occupancy condition had accrued by 2000.

151. The judge accepted that the facts of *Nicholson* were distinguishable because in that case there had not been a breach of the relevant condition for at least 10 years ([50]). In *Ellis* the condition had been breached for substantially more than 10 years and so it was necessary to decide whether, in addition, lawfulness depended upon the breach of condition continuing down to the date of the application for a CLEUD. The judge held that the court had decided in *Nicholson* that it did ([52]) and he went on to agree with that conclusion. Accordingly, *Ellis* is undoubtedly authority for that particular proposition.

152. The judge in *Ellis* stated at [54] that *Nicholson* had been approved in *Swale* [2006] J.P.L 886 at [6]. But in my judgment it is important to note that all that Keene LJ said in that passage was that the issue of whether enforcement action can be taken against a breach of planning control, in that case a change of use, is to be judged as at the date of the application for the CLEUD. In other words, the question of lawfulness is to be judged as at that date (see s.191(2) to (4)). The Court of Appeal did not endorse the conclusion in *Nicholson* that a breach of condition which has continued for 10 years must thereafter continue in order to remain lawful.

153. The judge acknowledged that *Panton* was authority for the proposition that a lawful use right which had accrued by virtue of s.171B(3) would not be lost merely by an interruption in that use, but could only be lost by abandonment, or the other methods referred to. But he concluded that changes of use were to be treated in a different way from a breach of condition, a distinction said to have been recognised in *Panton* (see [56]).

154. In *Ellis* the judge relied at [57] upon the acceptance in *Panton* at p.194 that *Nicholson* had correctly stated that if a period of compliance with a condition followed a period of non-compliance that breach would be at an end, and any later breach would constitute a fresh breach. It was said that a CLEUD could therefore only be granted in relation to a breach of condition which had continued down to the date of the application.

155. At [58] of *Ellis* the judge said that *Panton* and *Nicholson* were consistent with each other. I accept that conclusion as far as it goes. But in my judgment the flaw in the analysis summarised in [154] above is that what *Nicholson* was dealing with was a requirement for continuity during the 10-year period for achieving immunity from enforcement and lawfulness. Neither *Nicholson* nor *Panton* analysed the nature of the right which accrues and subsists after a breach of condition has continued for 10 years. Ultimately, *Nicholson* and *Ellis* depend upon an unstated assumption that the legal test for determining whether a breach of condition had become lawful over a period of time also governs the nature of the right which accrues and its continued existence.

156. At [60] of *Ellis* the judge stated that *Thurrock* did not assist the claimant's argument. I agree that *Thurrock* was concerned with whether the absence of abandonment could be relied upon to support the *acquisition* of immunity from enforcement, and did not address the issue in *Ellis* about the *retention* of use rights which have already accrued.

157. I also agree with the judge that the issue which had to be determined in *Ellis* did not arise in the authorities addressed in [61] to [64] of his judgment. Likewise, those authorities did not address the related point in *Nicholson* which he decided to follow.

158. At [66] of *Ellis* the judge returned to the central point in his reasoning, namely that because a breach of condition can cease and a fresh breach commence later, it follows that that type of breach must continue to subsist down to the date of the application for a CLEUD in order to be treated as lawful at that date. That was the same point as had been made in *Nicholson* and *Panton* (see [154] above).

159. I have reached the clear and certain conclusion that, with great respect, I should not follow the decisions in *Ellis* and in *Nicholson*, that a breach of condition which has become lawful after continuing for 10 years does not remain lawful unless that breach continues thereafter. I do not consider that those decisions can be reconciled with the following key points, along with the earlier analysis in this judgment:-

(i) The requirement that a breach should continue during the immunity period is not contained in the legislation (Sullivan J in *North Devon* at [30]);

(ii) That requirement is based solely on the rationale for the time limits in s.171B, namely that throughout the relevant period the local planning authority had the opportunity to take enforcement action but failed to do so. The continuity requirement is only concerned with whether the time period for satisfying an immunity period is running. Time only runs while a breach of planning control, whether a change of use or a breach of condition, is liable to enforcement action. Time does not run when a use or breach of condition has ceased;

(iii) Once an immunity period is satisfied, the legislation prohibits the taking of enforcement action *thereafter* (s.171B). It follows that from then on, any question about whether there is an ongoing breach of planning control against which a local planning authority would be able to take enforcement action would be completely irrelevant. The raison d'être for the continuity requirement disappears upon the expiration of an immunity period. There is no need to consider whether time is running for the purposes of s.171B;

(iv) Once an immunity period expires, what was formerly a breach of planning control becomes “lawful at any time”, save only that that planning right does not accrue if it would contravene the requirements of an enforcement notice then in force;

(v) There is nothing in the legislation to indicate that the requirement for continuity to satisfy an immunity period also characterises the nature of the legal right which accrues upon the expiration of a time limit in s.171B, or conditions the basis upon which that right may continue to exist thereafter, or that a right which accrues under s.191(2) or (3) ceases to exist when it ceases to be exercised;

(vi) The legislation does not treat a use, operation or breach of condition differently in these respects.

160. For completeness, I should mention the decision of the Court of Appeal in *Bilboe v Secretary of State for the Environment* (1980) P&CR 495, which was decided under the enforcement regime in the Town and Country Planning Act 1971. The Court of Appeal held (pp 512-4) that tipping of waste involves a material change of use and not operational development and so the then 4-year time limit in s.87(3)(b) for enforcement action against a breach of condition relating to operational development authorised by a planning permission (which ceased to apply as from PCA 1991) should not have been applied. Instead, the issue was whether the breach of planning control had begun before 1964. The Court held that it had. However, they did not address the continuity principle, although that was an explicit requirement in s.94 of

TCPA 1971 dealing with the conditions for the grant of an established use certificate for pre-1964 uses. Moreover, the focus of the Court's reasoning was on the issue of whether there had been a change of use, and if so when, rather than on the legal nature of any rights arising from a breach of condition. TCPA 1971 did not confer lawful planning rights on matters immune from enforcement, unlike the present TCPA 1990. Not surprisingly, the Court in *Bilboe* did not address the principles applying to the current statutory regime, as later set out in *Thurrock* and *Swale.* Accordingly, *Bilboe* does not provide any assistance on the nature of a lawful right which accrues under the present legislation when the time limit for taking enforcement action against a breach of condition has expired.

161. For all these reasons, I conclude that Islington's submissions under scenario (2) are incorrect. It follows that its analysis in scenario (3) collapses.

162. The correct legal position is that a lawful planning right which has accrued upon the expiry of a time limit in s.171B is not lost merely because subsequently that right is not exercised for a period of time. That conclusion applies just as much to a right legitimising a breach of condition which prohibited a use as to a use right derived from a material change of use. The law does not require that such a right be exercised on the date when an application for a CLEUD is made (or an enforcement notice is issued), or that it has been exercised throughout the intervening period from the time when it accrued. Instead, the law requires that the right remains in existence at the date when the lawfulness of what it authorises is in issue. So an accrued planning right must not have been lost in the meantime because of a supervening event, such as abandonment. The legal arguments in this case did not address in detail what other events might suffice to terminate a planning right arising from a breach of condition. It may well be that events of the kind recognised as terminating a use right would also suffice here, but any further discussion of that point should await a case in which it arises for decision by the court and is therefore addressed more fully in argument.

163. Before leaving ground 3, I think it would be helpful to clarify some further points. This case has had to focus on the breach of a negative condition restricting the use of land. But the range of conditions which may be imposed on a planning permission is very wide and varied and the nature of the breaches to which they can give rise may also vary considerably. For example, a condition may be mandatory in nature by requiring something positively to be done, e.g. a requirement to provide landscaping, noise attenuation or some other form of mitigation, parking spaces, or just obscure glazing to prevent overlooking through a window. Where such a condition is breached during the 10-year immunity period the accrued right will entitle the landowner not to comply with the condition thereafter. The continued existence of that right will not depend upon the landowner having to take any positive action to assert his right, let alone to continue taking that action. In my judgment there is no legal reason why the continued existence of a right which arises from breach of a negative condition should be any different in this respect.

164. The breach of a condition may be of a continuing nature, or it may be once and for all. For example, a condition may require an approval to be obtained before a specified activity may take place (as in *Bilboe*). The failure to obtain such an approval may well be treated as a once and for all breach of that particular control. But some conditions contain a negative and ongoing prohibition of an activity or on carrying on an activity outside a specified parameter (e.g. number of caravan pitches, or limits on emissions of noise or light or pollutants). Differences in the nature of the control imposed by a condition may affect the way in which an immunity period in s.171B falls to be applied, for example, the date from which times runs. As we have seen, the extent of any lawful planning right which accrues will be determined by the nature and extent of the breach which has continued during the relevant immunity period. But I do not presently see why, once that accrued legal right has been defined, its continued existence is affected by whether the past breach was of a once and for all or a continuing nature. It does not seem to me that the position is any different from the situation where a breach of planning

control relates to development without planning permission. Such a breach may be once and for all (e.g. the erection of a building) or continuing (e.g. a material change of use). There is no suggestion that the legal basis for the continued existence of an accrued right relating to development without planning permission is different according to whether the former breach of planning control was once and for all or a continuing breach.

165. Although Ocado has succeeded under ground 3, the question remains whether, and if so to what extent, that error vitiates Islington's findings that materially false statements were made and material information withheld on the application for the CLEUD? That issue will be considered under grounds 4 and 5 below.

Ground 2

166. The arguments on both sides under this ground became somewhat convoluted. But it is not necessary for the court to disentangle all of them in view of the conclusion I have reached under ground 3 above.

167. In summary, Ocado says that the application for a CLEUD was made on the basis that a lawful right to use units A-D for B8 purposes in breach of condition had accrued by 2002 and thereafter had not been abandoned. The approach taken in *Panton* to a use right was said to be applicable. Here Ocado submits that, irrespective of the outcome of ground 3, Islington acted illogically or irrationally in that the statements and withheld information upon which they relied could not properly be described as false and/or material according to the legal approach on which the CLEUD application had been founded. Those matters could *only* have been treated as false and/or material according to the *Nicholson/Ellis* approach which did not form the basis for the application. The matters relied upon by the authority relate to the period postdating the accrual of the lawful B8 use right in 2002 and therefore could only have engaged s.193(7) if it had been necessary for Telereal to show that the breach of condition had continued after 2002 down to the date of the application for the CLEUD. Because the officer who decided to grant the CLEUD had proceeded on the same understanding of the law as Telereal, Islington's true complaint was not that false statements had been made and/or material information withheld, but that the officer's legal approach had been incorrect. Islington was not entitled to rely upon s.193(7) to address that complaint instead of applying for judicial review to quash the CLEUD (para.39 of Ocado's skeleton).

168. It will be seen, and Mr. Brown QC accepted, that Ocado's argument under ground 2 could only arise if (a) the legal approach taken in the decision to grant the certificate had been wrong and (b) the matters said by Islington to engage the power of revocation in s.193(7) were irrelevant to that approach.

169. But the effect of my decision under ground 3 is that the legal approach advanced by Telereal in its s.191 application, and accepted by the officer in his decision to grant the CLEUD, was essentially correct. On that basis ground 2 adds nothing.

170. The issue left over from ground 3 is whether the legal error relating to Islington's reliance upon *Nicholson* and *Ellis* vitiated its conclusions that materially false statements were made and material information withheld on the application for the CLEUD. A related issue is whether, in any event, Islington relied upon those conclusions in relation to the correct legal basis for considering how an accrued planning right may be lost. These issues should be considered under ground 4 and 5 where Ocado argues that Islington's legal error under ground 3 tainted its treatment of the planning unit (ground 4) and the continued subsistence of the accrued right (ground 5).

171. For these reasons, I do not consider that there is any legal basis for quashing the revocation of the CLEUD under ground 2.

172. However, before leaving this subject I should add that I do not accept the broad proposition put forward by Ocado, namely that the falsity and/or materiality of statements made or information withheld may only be judged in the context of the legal approach upon which an application for a CLEUD is based. For example, a decision-maker may accept the information put forward by the applicant but grant a certificate adopting a rather different legal approach to that relied upon in the application. Subsequently, the local authority may decide to revoke the certificate relying on false statements or information withheld which are material to the legal approach upon which the decision was based, even if they are immaterial to the legal approach in the application.

Ground 4

173. In paragraph 28 of the Delegated Report on revocation Islington stated that the identification of the correct planning unit was a key factor in determining the existence of a lawful use right and the area to which it applied. This is not in dispute. Islington's statement is correct in relation to the legal approach adopted in Telereal's application for, and the officer's decision to grant, the CLEUD.

174. In the covering letter accompanying the application for the CLEUD, the planning consultants stated that units A-D had been occupied as a whole and as a single planning unit. They added that the lawful B8 use right which had been acquired through “continuous and uninterrupted occupation of the building” for that purpose over 10 years had “not been lost by abandonment, replacement by a different use, or extinguishment following the formation of a new planning unit.” Thus, the applicant rightly accepted that any B8 use right which had accrued by 2002 could have been lost if thereafter a new planning unit had been formed.

175. The planning unit is a long-established tool for defining an area of land (or building) in order to determine the use to which that area is put and whether a material change of use has occurred requiring planning permission.

176. In *Burdle v Secretary of State for the Environment* [1972] 1 WLR 1207 Bridge J (as he then was) identified some broad criteria, without purporting to propound exhaustive tests covering every situation (pp. 1212D-1213A) which may be summarised as follows:-

(i) A useful working rule is to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be identified;

(ii) Where the whole unit of occupation is used by the occupier for a single main purpose to which secondary activities are incidental or ancillary, that should be treated as the planning unit;

(iii) When a single unit of occupation is used for a mixture of activities and it is not possible to say that one is incidental or ancillary to another (a mixed or composite use), that whole area is a single planning unit. In such a case the component activities may fluctuate in their intensity from time to time, but the different activities are not confined to separate and physically distinct areas of land;

(iv) Where within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes, each area used for a different main purpose (together with its incidental and ancillary activities) is a separate planning unit;

(v) The application of these criteria, like the question of material change of use, is a matter of fact and degree;

(vi) Activities which were once incidental to another use or formed part of a composite use, may be so intensified in scale and physically concentrated in a recognisably separate area that they produce a new planning unit, the use of which is materially changed.

177. In *Johnston v Secretary of State for the Environment* (1975) P&CR 424 the Divisional Court re-emphasised that the identification of a planning unit is a question of fact and degree and only open to challenge on *Wednesbury* principles. *Prima facie* the planning unit is the area occupied as a single holding by a single occupier (p.427). Occupation is significant because it signifies control of an area of land by the occupier (p.428). In that case three lock-up garages capable of separate occupation were in fact in single occupation. There was no error of law in treating those three garages as a single planning unit to determine whether a material change of use had taken place (p.428). In *Church Commissioners for England v Secretary of State for the Environment* (1996) 71 P&CR 73 the Court confirmed that “control” had been a relevant factor for determining that a retail unit within a shopping mall was the appropriate planning unit rather than the single building comprising the shopping centre.

178. Although the covering letter from the planning consultants asserted that units A-D had constituted a single planning unit throughout, there having been no formation of a new planning unit, they did not produce any evidence themselves to support that contention. The annexed planning history did not deal with the issue. In other respects, the covering letter relied upon the statutory declaration of Mr. Molony and the lease to Royal Mail. But the statutory declaration did not address the *Burdle* criteria or whether the planning unit changed at any point. At most it indicated that BT, then Royal Mail, held a single property interest in the 4 units.

179. There was much discussion during the hearing as to whether it had been false for Mr. Molony to state that the four units A-D were interlinked, given that there was no physical inter-connection through the wall separating units B and C. Instead, access between the two could only be obtained by going outside one of these units into a shared loading area under a canopy (see the agreed statement between the parties). Likewise, because of this lack of internal connection between units B and C the same also applied to communication between units A and D. The only internal connections were between units A and B and between C and D. In view of decisions such as *Johnston* Mr. Forsdick QC did not claim that this could be sufficient to show, for example, that there were two planning units comprising (1) units A and B and (2) units C and D, rather than a single overall unit. But he said that this point fell to be considered with the misstatements and withholding of information which had not revealed that (i) units C and D had not been occupied by BT since 2006, (ii) they had been marketed for separate subletting since that year and (iii) Mr. Molony could not speak to the use made by Royal Mail of the site and hence there was no evidence about that subject.

180. It is apparent from paragraph 28 of the Delegated Report that Islington's concern about the planning unit related not just to the interconnection point, but was also based upon these other issues, as summarised at [121] (ii) to (v) and (vii) above. Mr. Forsdick QC pointed out that while these matters could be consistent with Ocado's case that there continued to be a single planning unit with usage reduced to, say, units A and B, they were also consistent with the possibility of the overall planning unit having being subdivided into two units. An important part of Islington's reasoning was that if the authority had been aware of the false statements and/or information withheld “it would have been alerted to the need to carry out further investigation in particular as to the planning unit” (para.8 of Delegated Report). Accordingly, Islington had not reached a concluded view on that issue and had not been required to do so (para.28).

181. Applying the principles set out in [93] to [102] above, Islington was legally entitled to rely upon those considerations to support its decision to revoke the CLEUD unless that line of inquiry could not rationally have led to any different conclusion being reached on the planning unit issue or was otherwise irrational. One of the problems faced by Ocado here is the exiguous amount of information and lack of detail in the material supplied to verify the application. By

contrast, where an application is robustly supported by evidence, the authority may judge that its decision to grant a CLEUD was not materially affected by false statements or withheld formation at the application stage, and would not have been affected even if further inquiries had been made. But given the minimalist approach taken to the s.191 application in this case, I find it impossible to say that Islington's conclusion that inquiries needed to be made which could have resulted in a different decision on the planning unit and on the grant of the CLEUD could possibly be impugned as irrational. Likewise, there is nothing irrational or illogical about Islington deciding to revoke the certificate without having yet been able to form a concluded view on the planning unit issue.

182. There is no merit in the criticism that the Delegated Report failed to apply the *Burdle* criteria. Those criteria would have been applied after a more detailed inquiry into the facts relating to the planning unit issue, involving the provision of more detailed information by the landowner. The *Burdle* criteria provide no basis for concluding that Islington's reasoning was irrational.

183. Ocado's argument focused on the issue regarding interlinking of the 4 units (skeleton para.54). But that criticism goes nowhere, because Islington relied upon the interlinking in combination with the other points referred to above, and not in isolation.

184. I wholly reject the contention that the officer who took the decision to grant the CLEUD ought to have discovered for himself the marketing exercise carried out on units C-D over a 5-year period by examining the “2011 tennis court application” (paragraph 54d of Ocado's skeleton). Islington had no obligation to go through each of the applications mentioned in the planning history or in the covering letter to see whether, on the off-chance, they might have contained any relevant information not disclosed by the applicant. That does not accord with the statutory framework as analysed above and the expectation that an applicant will be candid in the provision of information relevant to his application.

185. For all these reasons, ground 4 must be rejected.

Ground 5

186. I have held under ground 3 that once a lawful use right accrues its continued existence does not depend upon that right continuing to be exercised. Instead, the true question is whether that use right was thereafter abandoned or whether it was lost because of some other supervening event.

187. In the present case, Islington decided to revoke the certificate partly because they considered that the false statements and/or information withheld went to the issue of whether the B8 use had “continued” after 2002. If the authority's reasoning had stopped there, it would have been tainted by the legal error identified under ground 3. But it is clear that success under ground 5 cannot justify the quashing of Islington's decision to revoke the certificate, because the authority's approach to the planning unit issue cannot be impugned (see ground 4 above) and that was a freestanding and sufficient basis to found the decision. Islington's decision would inevitably have been the same. Telereal's covering letter accompanying the application rightly accepted, in line with *Panton*, that the creation of a new planning unit was one of three alternative routes (including abandonment) by which any lawful B8 use right could have been lost. Ocado did not argue otherwise in this case.

188. In any event, the Delegated Report plainly stated that Islington considered that the false statements and withheld information it identified went to Telereal's additional assertion that the B8 lawful use rights had not been abandoned as well as to Islington's contention that the use had not continued (para.23). Accordingly, the real issue now under ground 5 is whether Islington erred in law in reaching that conclusion on the subject of abandonment. As Mr.

Forsdick QC rightly pointed out, the need for Islington to carry out further investigations applied to both the abandonment and the planning unit issues (para.8 of the Report). Plainly, the two topics were related.

189. Here also, it is relevant to have in mind the absence of any evidence to support the assertion by Telereal's planning consultants that the B8 use which had accrued by 2002 had not been abandoned, albeit that Telereal knew that half of the floorspace (units C and D) had been vacant from 2006 and marketed at least until 2011 as a separate letting. Mr. Molony's statutory declaration did not address those matters nor did he address the four criteria for assessing whether a planning right had been abandoned (see [76] above). Telereal's application for the CLEUD did not provide any other information to support its contention that there had been no abandonment of a B8 use right. This is not a case where the landowner can say that there was other significant information before the authority when it granted the CLEUD which has not subsequently been criticised in the decision to revoke.

190. Accordingly, there is no merit in the faint criticism made by Mr Brown QC during oral argument that the reasoning given by Islington on this aspect was insufficient. Read in context, it is not arguable that the authority's legal reasoning was inadequate as a matter of law. Indeed, Ocado accepted that the point had not previously been raised. Ocado's criticism is not improved by referring to Islington's letter dated 7 August 2020. There the authority did say that abandonment was not in issue. But that was solely for the express reason given that, applying *Thurrock*, abandonment could not be relevant to whether a lawful use right had been created during the relevant 10-year period which, applying *Ellis*, had to run up to the date of the s.191 application. There was no justification for Telereal's planning consultants to misread that letter as stating that Islington had accepted that there had been no abandonment *as a matter of fact*, as they purported to do in their response dated 20 August 2020. There was no legal obligation on Islington to correct that blatant error. Ultimately, as we have seen, the Delegated Report considered the materiality issue on the alternative legal basis that its reliance upon *Ellis* might be incorrect.

191. Ocado's first real criticism under ground 5 is that if units A-D formed a single planning unit then the mere fact that units C and D were vacant for a period of time would be irrelevant to satisfying the implicit requirement in s.171B(3) that the use be “continuous” (para.55 of skeleton). There are two separate answers to this. First, the argument assumes that units A-D remained a single planning unit, which begs the question already addressed under ground 4. Second, we are now dealing with abandonment and not the continuity principle. Here, what is relevant is not merely whether an activity was interrupted or not, but the substantial period of time for which the property was not in active use together with the other factors listed in [76] above. The test is an objective one as to what would be the view of a reasonable person with knowledge of all the relevant circumstances. Accordingly, there is nothing in Ocado's first criticism. This is not a case where, on the information available, the issue of abandonment could not rationally have arisen.

192. Ocado's second criticism is that the vacant status of units C and D for 6 or more years could not have involved the withholding of material information because the covering letter sent with the application for the CLEUD stated that units A-D were not being used to capacity and referred to “the underused nature of the surrounding B8 units”. I reject this submission. “Not being used to capacity” is consistent with all four of units A-D being used. It does not indicate that BT had moved altogether out of units C and D and had concentrated its storage use entirely within units A and B, and moreover, had done so since 2006, and not merely in 2010 or 2011 when the tennis court applications were made. The statement that “surrounding units” “were underused” was no more explicit. Moreover, the context for this remark was “the B8 warehousing on the wider estate”, which did not indicate which of BT's B8 units was being referred to. In any event, these statements must be read alongside both Mr. Molony's statutory declaration that the whole of units A-D was in use as a B8 storage depot and the statement in

the covering letter that “the building was fully operational as a warehousing/storage depot” during the period 1992 to 2013, that is to say from 2006 to 2011 and beyond.

193. The assessment of falsity, withholding and materiality are, subject to any issue about relevance, matters of fact and degree, and therefore judgment, for the decision-maker, subject to challenge on the ground of irrationality. I have already dealt with the argument raised on relevance. I see no basis for contending that Islington's judgment was irrational. Rather, it seems to me to have been entirely reasonable, *a fortiori* given that the matters identified plainly required further investigation.

194. I regard as wholly untenable the suggestion in paragraph 57 of Ocado's skeleton that an applicant cannot be treated as withholding information in an application for a CLEUD if that information is already in the possession of the local planning authority. An applicant withholds material information if he has it and does not provide it to the authority. That remains the case even if the authority has that information in its records. Ocado's contention is completely at odds with the statutory scheme, which puts the onus on the applicant to justify the grant of a CLEUD with adequate verifying information. The legislation places a clear risk upon an applicant and his successors in title that a CLEUD may be revoked in the future if the conditions in s.193(7) are met. It is a deeply unattractive submission that what would otherwise amount to a material withholding of information justifying the revocation of a CLEUD, should be treated differently simply because the local planning authority did not search through its register of planning applications looking for anything which might undermine the application. Ocado's submission transforms the statutory expectation that an applicant will make an adequate and candid disclosure of relevant information into an implicit obligation on the local authority to search through its own records and files before granting a CLEUD.

195. Likewise, I reject the submission that material was not withheld because Telereal adequately “signposted” or summarised the content of the “tennis court application.” I have already referred to the “*actualité*” that units C and D were empty and unused for at least 5 years from 2006 as opposed to the “economical”, indeed misleading, statements that units A-D were fully operational between 1992 and 2013 but were simply not being used to capacity at the time of the application in 2011. Again, it is very unattractive to suggest that a landowner can avoid action being taken under s.193(7) to address a withholding of material information on the actual use of premises, which it plainly would have been aware of and which could have undermined its application, by making a cursory observation which would not be expected to raise any significant doubts in the mind of the reader about the merits of the application. The submission advanced by Ocado would simply encourage bad practice of this kind and undermine the transparency and soundness of, and even public confidence in, the certification regime. An unjustifiable burden would be placed on local authorities to check the material relied upon by an applicant to support a s.191 application against their records for information which is available to the applicant and should plainly be disclosed.

196. Finally, Ocado complains that the failure to mention in the application that Royal Mail had ceased to use the premises in 2015 could not have involved the making of any false statement or withholding of material information at the application stage. This is because the statutory declaration and the other material submitted to Islington said nothing about the nature or extent of Royal Mail's active use of the site, nor could Telereal have been expected to have had knowledge of such matters.

197. There is no merit at all in this complaint. Mr Molony's statutory declaration stated that as an employee of Telereal he had “responsibility” for units A-D down to the date of the application for a CLEUD (para.6). He stated that he was able to make the declaration from his own knowledge and that the information was complete and accurate (para.1). His declaration was expressly made for the purpose of “confirming the existing use” of the site and “in support of the application for a certificate of existing lawful use in respect of the site” (para.3). He con-

firmed that since at least 1992 the whole site was in use as a B8 warehousing/storage depot and “as far as I am aware, this has been continuous throughout.” On the basis of those statements Islington had been entitled to proceed on the basis that Mr. Molony knew what he was talking about. It was only in his second statutory declaration produced in response to the indication by Islington that revocation was being considered, that he revealed that he had not inspected the premises during Royal Mail's lease. On any view that was plainly a material withholding of information, which would justifiably lead Islington to question the sources and extent of the knowledge which Mr. Molony claimed to have for the period before and after 2014. Furthermore, beyond the revelation that Mr. Molony had not visited units A-D during Royal Mail's lease of the premises, Telereal's representations to Islington in 2020 did not state that neither he nor Telereal had no knowledge at all of the extent to which physical activity took place during that period, nor that they could not have been expected to have had such knowledge.

198. For all these reasons, there was nothing irrational or otherwise unlawful in Islington's identification of false statements or information withheld as being material to the abandonment issue. Accordingly, ground 5 must be rejected.

Ground 7

199. I have reached the conclusion that the challenge to Islington's decision that the conditions for exercising the power to revoke under s.193(7) must fail. Ground 7 only arises in that event. At this stage Ocado challenges Islington's exercise of its discretion as to whether to revoke the CLEUD. It does so on the basis that the authority failed to take into account certain relevant considerations. The principles in [105] to [107] above are relevant. In particular, Mr. Brown QC accepted that Ocado has to show irrationality.

200. First, Ocado submits that Islington failed to consider whether the false statements and information withheld would, as opposed to could, have led to a different outcome. This complaint is untenable. Islington stated in its decision *inter alia* that further investigation would have been necessary. That is sufficient to dispose of the suggestion that the absence of any conclusion about what the outcome would have been was irrational. Indeed, had Islington attempted to conclude that the CLEUD would still have been granted, that decision would have been liable to be quashed on an application by IP2.

201. Second, Ocado contends that Islington failed to consider the importance of (a) public confidence in the issuing of certificates of lawfulness and (b) the fact that Ocado had relied upon the CLEUD in this case before entering into an agreement for a lease of the premises. It is also submitted that it was Telereal, not Ocado, that made the application and Ocado “may…… not be in possession of the 'full and correct information'” needed for a fresh application under s.191.

202. Public confidence in CLEUDs must extend to the reliability of the information put forward by an applicant to support the grant of a certificate. That was a matter which Islington plainly had in mind in paragraph 8 of the Delegated Report. Telereal obtained a certificate to which it was not entitled on the basis of the information it provided and withheld.

203. Very little was said about harm to either Telereal or Ocado in the representations made to Islington in the event of revocation (see [9] and [18] above). Plainly, the progressing of the s.191 application would have been a key aspect of the negotiations for an agreement for a lease and Ocado would have had the opportunity to ask to see and consider the application in draft. Certainly, there is no evidence that they did not have any involvement at all. Substantial expenditure has been incurred in refurbishing units A-D, but the nature of the works was not explained to Islington in any detail, nor when and how the costs were borne, in particular as between Telereal and Ocado. Nothing was said about any remedies which Ocado might have against Telereal. The letter from Ocado's solicitors dated 25 June 2020 simply said that Ocado

would be prejudiced by the revocation of the certificate “by at the very least the uncertainty of applying for a fresh certificate or making a planning application.” It was not suggested that there would be any particular difficulty in obtaining appropriate information to support a fresh application. The solicitor's letter dated 20 August 2020 added that Ocado had “been put to considerable cost and inconvenience as a result of the Council's mishandling of the issue” without any further details.

204. In these circumstances, I do not accept that it was improper for Islington not to have given explicit consideration to Ocado's position in the Delegated Report. There is nothing to suggest positively that Islington disregarded the submissions relating to Ocado's position. In any event, even if Islington did fail to consider the non-specific representations made on Ocado's position, that could not be described as irrational. It would be difficult to give any significant weight to submissions of the kind which were put forward.

205. Next, Ocado complains that Islington had failed to consider the extent to which the *incorrect* legal approach adopted by the officer who had granted the CLEUD “contributed to any mistakes in the grant of the certificate.” There is nothing in this point. It falls away because, as I have decided under ground 3, that approach was not incorrect. Moreover, as I have already explained, Islington decided that the false statements and information withheld were material in relation to that correct legal approach taken by both Telereal and the officer.

206. Lastly, Ocado complains that Islington paid no regard to the planning merits of a B8 use on the site, as opposed to a light industrial or a general industrial use. This contention had not been developed in any detail in the representations to Islington before revocation. In these circumstances, this was not a case in which it was irrational for the authority not to make an assessment of the planning merits.

Conclusion

207. For all these reasons, Ocado's claim for judicial review of Islington's revocation of the CLEUD dated 26 April 2019 in respect of units A-D on the Bush Industrial Estate must be dismissed.

APPENDIX 2

O'flynn v Secretary Of State For Communities And Local Government (2016) [2016] EWHC 2894 (Admin)

QBD, ADMINISTRATIVE COURT

CO/1041/2016

Lang J

Date: 17 November 2016

17/11/2016

Mrs Justice Lang:

1. The Claimant applies under section 288 of the Town and Country Planning Act 1990 ("TCPA 1990") to quash the decision of the First Defendant, made on his behalf by an Inspector on 19 January 2016, in which he dismissed the Claimant's appeal from the Second Defendant's refusal to grant him a certificate of lawful existing use or development ("CLEUD"), pursuant to section 191 TCPA 1990.

2. The Claimant is the owner of a property known as Glenthorne, Five Ways Road, Hatton, Warwickshire CV35 7HZ (hereinafter "the Site"), comprising a dwelling-house and 3.5 acres of land.

3. There was a smallholding on the Site for many years, though it had ceased to be used for this purpose in the late 1970's. The Claimant purchased the Site in 1996. At that time, according to the Claimant, it had nothing which could be described as a garden. The land was overgrown. The southern part of the Site, to the rear of the dwelling-house, was semi-derelict and included the concrete bases of old agricultural buildings and piles of bricks. The northern part of the Site was paddock grass, which was being cut by a farmer, at the request of the previous owners.

4. Over the years since he purchased the Site, the Claimant has removed the remnants of the smallholding and cultivated the land. He has planted trees, shrubs, hedges and flowers; grown fruit and vegetables; constructed greenhouses and composting bins; and laid, levelled and maintained extensive lawns. He has also installed a well, a pond, fencing, hardstanding, a new drive, and garden seating. His case was that the entirety of the land had become one extensive garden, which was in regular use for normal residential activities by the Claimant and his family, including their dogs, and their visitors.

5. On 21 March 2013, the Claimant applied to the Second Defendant for a lawful development certificate for the use of land as incidental to the enjoyment of a dwelling house. The Second Defendant refused the application on 30 May 2013.

6. The Claimant appealed and the appeal was decided by way of written representations, on 23 December 2013 ("the 2013 Decision"). An Inspector (hereinafter "the first Inspector") allowed the appeal in respect of the southern

part of the Site, but not the northern part which lay to the north of a privet hedge running across the Site. The southern part of the Site contained the dwelling house, driveway, garages and outbuildings, garden ornamentals, shrubs etc. The first Inspector found that the use of the southern part of the Site for purposes incidental to the enjoyment of the dwelling house was uncontroversial and supported by the evidence. The first Inspector certified that, in respect of the land to the south of the privet hedge, as shown on the attached plan, "*[t]he use of the land ….. for purposes incidental to the enjoyment of the dwelling house commenced before 23 March 2013 and has continued.*".

7. However, the first Inspector concluded that the Claimant had failed to demonstrate, on the balance of probability, that the use of the land to the north of the privet hedge for purposes incidental to the enjoyment of the dwelling house commenced prior to the material date.

8. On 21 January 2014, the Claimant again applied to the Second Defendant for a lawful development certificate for the use of land as incidental to the enjoyment of a dwelling house. The Second Defendant refused the application on 26 March 2014.

9. The Claimant appealed. The Inspector (Mr Morden) held a 2 day Inquiry and conducted a site visit. In his Decision dated 19 January 2016 ("the 2016 Decision"), he concluded that the Claimant had failed to demonstrate that the northern part of the Site was in use for residential purposes incidental to the use of the dwelling house, and that such use commenced prior to 21 January 2004, and had continued since that date. He considered that the northern part of the Site was different in character and appearance to the southern part of the Site, as it was more like a large landscaped garden, laid to lawn with trees, than a residential garden with flower beds, pot plants etc. He concluded that the family's activities on the northern part of the Site were insufficient to amount to incidental residential use. As the northern part of the Site was not being used for any other purpose, he concluded that it had a "nil use".

10. The Claimant applied to quash the 2016 Decision and Collins J. granted permission on the papers on 9 May 2016.

LAW

Applications under section 288 TCPA 1990

11. Under section 288 TCPA 1990, a person aggrieved may apply to quash a decision on the grounds that (a) it is not within the powers of the Act; or (b) any of the relevant requirements have not been complied with and, in consequence, the interests of the applicant have been substantially prejudiced.

12. The general principles of judicial review are applicable to a challenge under section 288 TCPA 1990. Thus, the Claimant must establish that the Secretary of State misdirected himself in law or acted irrationally or failed to have regard to relevant considerations or that there was some procedural impropriety.

13. The exercise of planning judgment and the weighing of the various issues are matters for the decision-maker and not for the Court: *Seddon Properties v Secretary of State for the Environment* (1978) 42 P. & C.R. 26. As Sullivan J. said in *Newsmith v Secretary of State for the Environment, Transport and the Regions*[2001] EWHC Admin 74, at [6]:

"An application under section 288 is not an opportunity for a review of the planning merits of an Inspector's decision."

14. An Inspector is required to give adequate reasons for his decision, pursuant to Rule 18 of the Town and Country Planning (Inquiries Procedure) (England) Rules 2000. The standard of reasons required was described by Lord Brown in *South BucksDistrict Council and Anor v Porter (No 2)* [2004] 1 W.L.R. 1953, at [36].

15. An Inspector's decision letter must be read (1) fairly and in good faith, and as a whole; (2) in a straightforward down-to-earth manner, without excessive legalism or criticism; (3) as if by a well informed reader who understands

the principal controversial issues in the case: see Lord Bridge in *South Lakeland v Secretary of State for the Environment* [1992] 2 AC 141, at 148G-H; Sir Thomas Bingham MR in *Clarke Homes v Secretary of State for the Environment* (1993) 66 P. & C.R. 263, at 271; *Seddon Properties v Secretary of State for the Environment* (1981) 42 P. & C.R. 26, at 28; and *South Somerset District Council v Secretary of State for the Environment (1993) 66 P. & C.R. 83.*

Statutory provisions

16. Section 191 TCPA 1990 provides:

"191.— Certificate of lawfulness of existing use or development.

(1) If any person wishes to ascertain whether—

(a) any existing use of buildings or other land is lawful;

(b) any operations which have been carried out in, on, over or under land are lawful; or

(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and

(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

(3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—

(a) the time for taking enforcement action in respect of the failure has then expired; and

(b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

(3A) In determining for the purposes of this section whether the time for taking enforcement action in respect of a matter has expired, that time is to be taken not to have expired if—

(a) the time for applying for an order under section 171BA(1) (a "planning enforcement order") in relation to the matter has not expired,

(b) an application has been made for a planning enforcement order in relation to the matter and the application has neither been decided nor been withdrawn, or

(c) a planning enforcement order has been made in relation to the matter, the order has not been rescinded and the enforcement year for the order (whether or not it has begun) has not expired.

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

(5) A certificate under this section shall—

(a) specify the land to which it relates;

(b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);

(c) give the reasons for determining the use, operations or other matter to be lawful; and

(d) specify the date of the application for the certificate.

(6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

…"

17. By section 57(1) TCPA 1990, planning permission is required for the development of land. Section 55 TCPA 1990 provides, so far as is material:

"Meaning of "development"

55(1) Subject to the following provisions of this section, in this Act, except where the context otherwise requires, "development" means the carrying out of building…or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.

…..

(2) The following operations or uses of land shall not be taken for the purposes of this Act to involve development of the land –

…..

(d) the use of any buildings or other land within the curtilage of a dwelling-house for any purpose incidental to the enjoyment of the dwelling-house as such;

….."

GROUNDS

Grounds 1 and 2

18. It is convenient to consider Grounds 1 and 2 together, as there is some overlap between them. Under Ground 1, the Claimant submitted that the Inspector had erred in excluding certain uses from his consideration of what could amount to a residential use of land, or uses incidental to residential use. Under Ground 2, the Claimant submitted that the Inspector failed to take account of relevant considerations and his decision was irrational.

19. In response, Ms Parry submitted that the Claimant was, in reality, challenging the planning merits of the Inspector's decision, which was impermissible. The judgment which the Inspector had to make, namely, whether the northern part of the Site had been used in a way that was incidental to the residential use of the house for over 10 years, was plainly one of fact and degree, depending substantially on the impressions gained by the expert Inspector at the Site visit and from hearing evidence at the Inquiry. The Court should be slow to interfere in such circumstances, and the threshold of irrationality was a difficult obstacle for the Claimant to surmount.

20. Ms Parry's legal analysis was plainly correct. I agree that, in the Claimant's wide-ranging written and oral submissions, there were occasions where he was, in reality, challenging the planning merits of the Inspector's decision. In particular, on numerous occasions where he sought to challenge the Inspector's findings on the grounds that they were inconsistent with the evidence. I do not consider that the Claimant has succeeded in establishing that the decision was irrational. However, I have reached the conclusion that the Claimant has identified some errors in the Inspector's approach which amount to errors of law, and could have affected the outcome.

21. The question which the Inspector had to determine under section 191 TCPA 1990 was whether there was a lawful existing use of the land for residential purposes incidental to the residential use of the dwelling-house. As a convenient shorthand, I will refer to this as “incidental residential use”. He approached this question by considering whether a use of the land for residential purposes had commenced prior to 21 January 2004 (ten years before the date of the CLUED application), and had continued since that date, in which case it would have become immune from enforcement proceedings. Under Ground 3 below, I have concluded that he ought also to have considered whether, as at the date of the CLUED application on 21 January 2014, a use of the land for residential purposes was lawful since it did not constitute development by virtue of the dwelling-house exception in section 55(2)(d) TCPA 1990.

22. The land identified in the application notice was the entirety of the Site. There was a lawful existing use as a dwelling-house on the Site and the 2013 Decision had certified that there was a lawful existing use for purposes incidental to the enjoyment of the dwelling-house south of the privet hedge. So the only issue in dispute was the existing lawful use of the area of land to the north of the privet hedge which had been excluded from the certificate in the 2013 Decision.

23. It was apparent from the photographic evidence (which dated back as early as the 1970's) that the entire Site was open until 2000 when the Claimant installed a privet hedge, accompanied by a temporary post and rail fence, running west to east across the Site, with gaps for access, wide enough for a mower. In 2014, the Claimant removed almost all the hedge, and the remnants of the fence, but the line of the former hedge continued to be used as the boundary in the determination of this application.

24. The Claimant contended that there had been a material change of use of the northern part of the Site from its previous agricultural use as a smallholding to incidental residential use. He submitted that the change of use had occurred when he developed the unbuilt land on the Site into one residential garden, between 1998 and 2000.

25. At the Inquiry, the parties cited the well-known passage in *Burdle v Secretary of State for the Environment* [1973] 3 ALL ER 240, where Bridge J. identified the approach to be adopted, at 244:

“First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered … But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time but the different activities are not confined within separate and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a

different main purpose (together with its incidental and ancillary activities) ought to be considered as a separate planning unit."

26. I do not accept the Claimant's submission that the Inspector failed to follow the approach in *Burdle*. He was not required to refer to it directly. It is apparent from Decision Letter ("DL") paragraphs 4 and 5 (DL4 & 5) that his starting point was to treat the whole Site as the planning unit, as it was an undivided parcel of land in the ownership of the Claimant. This was in accordance with *Burdle*. The Inspector's conclusion, at DL42, that the northern part of the Site had a different use to the rest of the Site, despite being in the same ownership, was in principle consistent with the third situation identified in *Burdle*, as relied upon by the Second Defendant in its submissions. The Inspector's general observations at paragraph 32 were not inconsistent with *Burdle* and were not otherwise incorrect or inappropriate.

27. In my judgment, the Inspector was not obliged to apply or have regard to the other appeal decisions provided by the Claimant since these turned on the evidence relevant to the particular site, and were plainly distinguishable.

28. I consider that the first error in the Inspector's approach was his failure to take into account the Second Defendant's concession that there had been a change of use of the northern part of the Site to incidental residential use from about April 2013, because of the changes in appearance and use of the land. Although this concession was expressly made in the Second Defendant's written closing submissions, the Inspector did not refer to it in his decision, and did not analyse the evidence so as to consider the basis for the distinction drawn by the Second Defendant before and after April 2013. His conclusion was that the northern part of the Site had a nil use throughout the Claimant's ownership of the Site, and continued to do so. The Inspector was thus in the unusual position of disagreeing with both parties as to the current use. Even the objector neighbours accepted that there had been lawn games and gardening activities since the first part of 2013 (paragraphs 38 and 39 of the 2013 Decision).

29. The Inspector correctly directed himself that the onus of proving the lawfulness of an existing use or development rested on the applicant, and the test was the balance of probabilities. However, the 'Planning Practice Guidance' ("PPG") provides:

"In the case of applications for existing use, if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability."

30. In *Gabbitas v Secretary of State for the Environment* [1985] JPL 630, an Inspector's decision on an appeal against an enforcement notice was quashed on the ground that he had failed to direct himself properly as to relevant considerations by rejecting the applicant's unchallenged evidence without giving any reasons for doing so and requiring corroboration of his evidence by an independent witness.

31. In my judgment, the PPG and *Gabbitas* lend support to my conclusion that the Inspector erred in not taking account of the Second Defendant's concession that there had been an incidental residential use from 2013, which supported the Claimant's case, at least from 2013 onwards.

32. Alternatively, if the Inspector did have regard to the concession but disagreed with it, he ought to have given his reasons for not accepting the consensus of the parties on this issue.

33. The second error in the Inspector's approach was discounting the Claimant's gardening activities when assessing incidental residential use. The Inspector said (*emphasis added*):

"35. Planting and maintenance and even appearance though do not infer active residential use or incidental residential use of any land…

36. Turning to what use has actually been made of the land, the appellant's own evidence amounted to, what I agree,

would have been regular in relation to the small vegetable patch and composting, but that only takes place in a very small area in the south west corner. Further, people do not need to attend to a small vegetable patch and composting bins every day.

37. The area involved has recently expanded a little with the erection of the green house beside the vegetable patch but over a whole year the amount of hours spent actively maintaining, growing and harvesting the produce would not be sufficient to result in a material change of use of the land from a nil use (if that is what is was) to some other use, and it is arguable that it would be an incidental residential use in any event. It might take place on land within the same ownership but the growing of produce even for one's own consumption is, in my view, more of an agricultural activity rather than an incidental residential one.

38. …..It is reasonable to conclude that the whole of the land would have been maintained in any event (grass cut, hedgerows clipped etc) even if the grass would not necessarily have been close mown to a short lawn type length. In those circumstances those activities should not, in my view, be taken into account in trying to determine whether the land has incidental residential use."

34. Whilst it is obviously correct that non-residential land has to be maintained, this does not mean that a home owner's gardening activities should not be taken into account in assessing incidental residential use. In my view, tending the garden in which a dwelling-house is situated is quintessentially an activity carried out by home owners incidentally to the residential use of the dwelling-house. As well as being necessary to keep the land tidy, some (like the Claimant) find gardening creative and enjoyable. Moreover, although fruit and vegetable growing could be an agricultural activity, a fruit and vegetable patch in a private garden which merely provides produce for the occupants would usually be considered as incidental to the residential use, as the Inspector himself acknowledged in discussion at the Inquiry.

35. The Inspector accepted the Claimant's evidence, supported by photographs, of the extensive landscaping, planting and maintenance which he had carried out over the years, in both the southern and northern parts of the Site. The Claimant had planted specimen trees in the northern part, and levelled, repaired and mowed the lawn, with the result that the lawn in both the southern and the northern parts of the Site had the same texture and appearance. The Claimant had also created the fruit and vegetable patch and a composting area and installed a greenhouse in the northern part. The compost was used throughout the Site, including the southern part.

36. The evidence demonstrated that the Claimant, largely through his own toil, has transformed a semi-derelict smallholding and field into a fine garden. The ongoing maintenance, which he does himself, represents a substantial commitment of time and effort. In my judgment, on the facts of this case, the Claimant's gardening activities ought to have been fully taken into account when assessing the incidental residential use of the northern part of the Site. If the Inspector had done so, it could have affected his conclusion that there was insufficient evidence of incidental residential use.

37. The third error in the Inspector's approach was in respect of the Claimant's use of the Site as a place to stroll around, sit out, and walk his dogs. The Inspector accepted the Claimant's evidence on this issue, stating:

"25. Both the appellant and one of his sons gave evidence about activities that had taken place on the northern land over the years. The appellant stated that he walked and relaxed around the whole of his site on a daily basis and sometimes several times a day, walking the family dogs and just enjoying the land for its own sake. It is not surprising that someone who owned this land would do such a thing on a regular basis. I can see that is something that would certainly occur on more days than it did not although I consider it unlikely that it was every day ….

26. I have no doubt that it was a very regular activity as the appellant states. The Council had no evidence to the contrary and whilst several nearby occupants cast doubt on the activity ….it would not be apparent that someone was in the area walking around or sitting on one of the benches just relaxing…."

38. However, in his conclusions the Inspector discounted these activities, to some extent, when assessing the extent of the incidental residential use, saying:

"41. The Appellant clearly does spend some time on the land and stated that he walked and relaxed on it daily, sometimes with his dogs but not necessarily. The land can also now be seen from the house and immediate surrounds of the property as the hedge has been removed. Just walking around on it and enjoying it for its appearance sake either from the dwelling or when on the land is not, in my view, sufficient to determine that the land can be considered to have a residential use or an incidental residential use. As with the other activities … the total amount of time spend on the land partaking in these activities in a year is minimal, and again, I conclude is de minimis."

39. In my judgment, the Inspector erred in holding that "just walking around on [the land] and enjoying it for its appearance sake either from the dwelling or when on the land" could not be "sufficient" to amount to a residential use or activity incidental to a residential use. In my judgment, this was incorrect. In principle, an owner's recreational use and enjoyment of a plot of cultivated land in which his dwelling-house is situated can amount to a use of the land which is incidental to residential use. It will depend on the facts in the particular case. Obviously if the owner has a large estate, some of his land which he is using or enjoying in this way may have a different use such as horse paddocks, woodland, or agricultural. But on the Claimant's case, he was simply enjoying his enlarged garden.

40. I also consider that the Inspector's conclusion, in DL41, that the time thus spent on the land was "*minimal*", was curiously at odds with his earlier acceptance that it took place very regularly, on more days than not (DL25 & 26). The evidence before the Inspector was that the Claimant had been based at home since his semi-retirement in 2001. It was not in dispute that the land was kept available for use by the Claimant and his family at all times; it had no other use. I agree with the Claimant's submission that, if the Inspector accepted that the land was being used for these incidental residential activities for some of the time, the mere fact that the Claimant was not in his garden at a particular hour did not mean that the land ceased to be in use for incidental residential purposes for that hour. An analogy may be drawn with residential use which continues, even when there is no one physically in the dwelling.

41. For the reasons which I have set out in paragraphs 39 and 40 above, I consider these activities were not fully taken into account by the Inspector when assessing whether there was sufficient evidence of incidental residential use, and so his error could have affected the outcome.

42. Further, or in the alternative, I consider that the Inspector failed to give adequate reasons for his conclusions that the time spent on these activities was minimal having regard to his earlier findings on the evidence (see Ground 4).

Ground 3

43. Under Ground 3, the Claimant submitted that the Inspector erred in not considering and determining the factual and legal issues which he raised about the extent of the curtilage of the dwelling-house, which were relevant to the question whether there was a lawful existing use pursuant to the dwelling-house exception in section 55(2)(d) TCPA 1990, as at the date of his CLUED application on 21 January 2014.

44. In response, the First Defendant submitted that the Inspector was not required to consider this issue because it was not identified in the CLUED application form or in the Claimant's submissions at the appeal. Furthermore, since the Inspector found that there was no existing residential use in the northern part of the Site, he could not have certified that there was an existing lawful use of the land.

45. In my judgment, the Inspector erred in refusing to consider the potential relevance of the curtilage and section 55(2)(d) TCPA 1990 to the Claimant's application.

46. The phrase "*any existing use of buildings or other land is lawful*" in section 191(1)(a) TCPA 1990 reflects the terms used in section 55 TCPA 1990, which provide that "*development*" includes "the making of any material change

in the use of any buildings or other land". However, section 55(2)(d) provides that "*the use of any buildings or other land within the curtilage of a dwelling house for any purpose incidental to the enjoyment of the dwelling-house as such*" shall not be taken to involve development for the purposes of the TCPA 1990.

47. Under section 191(2)(a), there were two alternative routes by which the Claimant might be able to establish that an incidental residential use of the northern part of the Site was lawful (assuming that he was able to establish that an incidental residential use was in existence at the relevant time). The first route was to establish that, as at the date of the Claimant's application, on 21 January 2014, no enforcement action could be taken in respect of an existing incidental residential use within the curtilage of the dwelling-house because, by virtue of the exception in section 55(2)(d), it did not constitute "development". The second route was to establish that no enforcement action could be taken in respect of an existing incidental residential use because it had commenced prior to 21 January 2004, and had continued thereafter, so the ten year time limit for enforcement action had expired.

48. The Claimant has throughout been acting as a litigant in person, obtaining some advice from a planning lawyer, but drafting all the documents and submissions himself. Although he has accessed some planning law materials, his grasp of planning law is far from the level of a trained professional. In my view, the Inspector had to make allowances for the fact that the Claimant was not professionally qualified.

49. It would have been apparent to the Inspector from the 2013 Decision that the Claimant's first CLUED application was stated to be "*an application for a lawful development certificate for the existing use of land as domestic curtilage incidental to the enjoyment of a dwelling-house*". This wording was obviously based upon the terms of section 55(2)(d) TCPA 1990.

50. In the 2013 Decision, the first Inspector refused to use the Claimant's wording, saying:

"2. Curtilage defines an area of land in relation to a building rather than a use of land. Accordingly the description of development contained on the application form makes no sense. What appears to have been applied for is the use of the land for purposes incidental to the enjoyment of the dwelling house……I propose to deal with this appeal on this basis."

51. The first Inspector certified that, in respect of the land to the south of the privet hedge, "[t]he use of the land ….. for purposes incidental to the enjoyment of the dwelling house commenced before 23 March 2013 and has continued."

52. In his second CLUED application, the Claimant applied for "a Lawful Development Certificate (LDC) for the existing use of land for purposes incidental to the enjoyment of a dwelling house". He based this wording on the terms used by the first Inspector in the 2013 certificate.

53. However, in the 2016 Decision, a different Inspector again refused to use the Claimant's wording, stating:

"2. The application form described an activity that is not a planning land use. The parties agreed that the correct description of what use was being sought as lawful was the use of the land for residential purposes. It was acknowledged that what the appellant was claiming was that the land had been used for residential purposes incidental to the residential use of his dwelling house."

54. Then, in paragraph 4, the Inspector identified the main issue as whether "the use of the land …..for residential purposes incidental to the use of the dwelling house commenced prior to 21 January 2004, and has continued since that date". He made no mention of the dwelling-house exception in section 55(2)(d).

55. It is correct, as Ms Parry submitted, that in his application form the Claimant had only ticked the pro forma ground which states "*[t]he use began more than 10 years before the date of this application*". He ought also to have ticked the box which read "*Other – please specify (this might include claims that the change of use or building work was not*

development or that it benefited from planning permission granted under the Act or by the General Permitted Development Order)" and given details.

56. However, I do not consider that this omission by a litigant in person absolved the Inspector from considering the section 55(2)(d) ground, particularly since the statutory provision and relevant case law was relied on extensively by the Claimant in his grounds of appeal and statement of case. For example, the Claimant referred to *Sinclair-Lockhart's Trustees v Central Land Board* (1950) 1 P. & C.R. 195; *Dyer v Dorset County Council* [1989] 1 Q.B. 346; *Skerritts of Nottingham Ltd v Secretary of State for the Environment, Transport and the Regions* [1999] 2 P.L.R. 109; *Collins v Secretary of State for the Environment* [1989] E.G.C.S. 15; *Sumption v Greenwich LBC* [2007] EWHC 2776 (Admin) and *Lowe v First Secretary of State* [2003] JPL 1281.

57. The Claimant sought to apply the legal principles in the case law to the facts of his application, submitting that the entirety of the Site now fell within the curtilage of the dwelling-house, and was in use for purposes incidental to the enjoyment of the dwelling-house, within the meaning of section 55(2)(d) TCPA 1990. The Second Defendant also engaged to some extent with this issue, seeking to distinguish the case of *Sumption v Greenwich LBC* in oral and written submissions.

58. Given that the Second Defendant conceded at the Inquiry that, on the evidence, the Claimant had established an existing incidental residential use in the northern part of the Site from April 2013, it was not unreasonable for the Claimant to argue that he could establish such a use as at January 2014.

59. The curtilage of the dwelling-house was very narrowly delineated in the Land Registry plan of 1967 which was before the Inspector. However, the Inspector also had copies of correspondence and plans from the Second Defendant which showed that, following grants of planning permission in the 1980's and 1990's, the dwelling-house had been extended significantly and so had the curtilage of the dwelling-house. Planning permission was granted in 1984 to extend the 1930's bungalow in size and convert it into a two-storey dwelling-house. Planning permission was granted in 1990 to erect a large garage/workshop/stores building at some distance to the west of the house, but this permission was not implemented. Planning permission was again granted in 1993 to erect a large garage/workshop/stores building behind the house, on condition that the disused agricultural buildings (apart from a small stable/pigsty) were demolished.

60. In the 2013 Decision, the Inspector addressed the question of the curtilage, stating:

"10. The reason for refusal refers to "…the *whole* of the land" [*original italics*] with the strong inference that some of the land might have been used for purposes incidental to the enjoyment of the dwelling house for a period of 10-years. The land registry plan shows a tight boundary around the dwelling that existed at the time that the OS base was drawn. On a balance of probability this is likely to be an indication of the historic curtilage of the dwelling.

11. However a reasonable reading of the Council's delegated report suggests that the Council goes further. It says "The physical separation of the site by a Golden Privet hedge does not in itself preclude lawful use of land to the north as a incidental garden…". Stopping there, I consider that to be the main area of dispute and one I shall return to in my main reasoning in due course. It continues "…however this curved hedge itself was only planted in 2000 and forms part of the formalised 'residential' encroachment towards the north".

12. The next paragraph makes a clear distinction between the areas on either side of the privet hedge. It says the land to the south *"…contains the property and its driveway, outbuildings, shrub beds, garden ornamentals and associated residential paraphernalia"*. Although the Council has not made its position clear with regard to the land to the south of the privet hedge the strong inference must be that it regards the use of that area for purposes incidental to the enjoyment of the dwelling house to be lawful. That area contains a number of outbuildings, which extend beyond the boundary on the land registry plan. In particular there is a drive serving a substantial block of garages. The Council says there is no relevant planning history but the Appellant lists 3 applications from 1984, 1990 and 1993, copies of which have not been provided. Amongst other things the later applications are said to have permitted the garage,

store and workshop building, which strongly suggests the Council considered the land to the south of the privet hedge to be garden and/or part of the curtilage over 20 years ago. For these reasons I consider that an LDC should be issued in the terms sought for, at least, the land to the south of the privet hedge."

61. This passage indicated that the Second Defendant and the first Inspector considered that the curtilage had, by 2013, been further extended to include the entirety of the area south of the privet hedge. It was at least arguable that the curtilage had since been further extended to include the northern part of the Site.

62. The Inspector dealt with these submissions in the following way:

"43. Reference was made in the statement of case and there was also some information and reference to other cases in the evidence about the question of curtilage. I made it clear to the parties at the opening of the Inquiry that curtilage was not a use of land in planning terms. The LDC application was concerned with the use of the land, not whether it formed part of the residential curtilage of Glenthorne. I stated that it was not something that I needed to make a decision on and it would have no bearing on my decision…. "

63. In the light of the submissions made to him, and the material before him, I consider that Inspector erred in not considering and determining the Claimant's submission that, under section 191(2) TCPA 1990, as at the date of the Claimant's application, on 21 January 2014, no enforcement action could be taken in respect of the claimed incidental residential use of the northern part of the Site as it was within the curtilage of the dwelling-house, and so by virtue of the exception in section 55(2)(d) TCPA 1990, it did not constitute "*development*".

64. Ms Parry rightly points out that, even if the Inspector had considered this issue, he would still have refused to grant a certificate of existing lawful use since his conclusion on the evidence was that there was no incidental residential use of the northern part of the Site. However, this does not assist the Defendant since that I have also found that his approach to that question was flawed, under Grounds 1 and 2.

Ground 4

65. The Claimant submitted in his Grounds that the Inspector's reasons were inadequate because he had failed to explain why certain uses were not residential or why the extent of the curtilage was irrelevant to his decision. He provided further examples in his response to the Defendant's Grounds.

66. This ground has been largely overtaken by my conclusion that the Inspector erred in law in his approach to the decision-making process. However, I have held that the Inspector's reasons were inadequate at paragraphs 32 and 42 of my judgment.

Ground 5

67. In view of my conclusions, the issue of a partial certificate does not fall to be decided.

Ground 6

68. The basis of Ground 6 was that, after the Inquiry, the Second Defendant and an interested party wrote to the Inspector stating that the Claimant had not provided them with a copy of a memory card upon which he had recorded the Inquiry. An officer of the Planning Inspectorate subsequently confirmed that the Inspector had been mistaken in advising the parties at the Inquiry that the Claimant had to make his copy of the recording available to other parties. The Claimant submitted that these communications with the Inspector were unfair, in breach of the statutory procedures, and probably prejudiced the Inspector against him.

69. I accept the Defendant's submission that these communications were not improper; they had no bearing on the

matters which the Inspector had to decide; and they were most unlikely to have influenced the Inspector adversely against the Claimant. Therefore I reject Ground 6.

Conclusions

70. For the reasons I have set out above, the Inspector erred in law in making his decision. Absent those errors, his conclusions could have been different. Accordingly, it is appropriate to quash the decision.

71. I refuse the Claimant's application for damages, as this is a statutory review procedure and the only remedies are those which are set out in section 288 TCPA 1990. They do not include the award of damages. However, the Claimant is entitled to make an application for costs, which he should do in writing.

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APPENDIX 3

The Planning Inspectorate

Appeal Decisions

Inquiry held on 5 and 6 September 2017

Site visit made on 6 September 2017

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

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

Decision date: 05 October 2017

Appeal A Ref: APP/T3725/X/15/3002141

Glenthorne, Five Ways Road, Hatton, Warwick CV35 7HZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Richard O'Flynn against the decision of Warwick District Council.
- The application Ref W/14/0083, dated 21 January 2014, was refused by notice dated 26 March 2014.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use of the land for purposes incidental to the enjoyment of the dwelling house.
- This decision supersedes that issued on 19 January 2016. That decision on the appeal was quashed by order of the High Court.

Appeal B Ref: APP/T3725/X/17/3172164

Glenthorne, Five Ways Road, Hatton, Warwick CV35 7HZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Richard O'Flynn against the decision of Warwick District Council.
- The application Ref W/16/0112, dated 22 January 2016, was refused by notice dated 21 March 2016.
- The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use of land for residential purposes incidental to the residential use of a single private dwellinghouse.

Decision

1. The appeals are allowed and attached to this decision is an LDC describing the existing use which is considered to be lawful.

Procedural matters

2. An application for costs has been made by Mr O'Flynn against Warwick District Council. This application is the subject of a separate Decision.

3. The Council accepted at the Inquiry that Appeal B should be allowed if Appeal A is allowed. All evidence given at the Inquiry was given under oath.

Background information

4. Glenthorne is a detached dwelling in a residential plot of about 1.4 hectares with an east boundary to Five Ways Road. The plot was a smallholding until the end of the 1970's with a small bungalow in its south-east corner. In 1984 the then owner obtained planning permission for the 'erection of a first floor comprising four bedrooms and two bathrooms, a utility room at the ground floor and a chimney', which was subsequently implemented. In 1993 planning permission was granted for 'retention of a replacement building to provide garaging, stores and a stable'. The Appellant purchased the property in 1996 and photographic evidence indicates that the plot was predominantly rough grassland at that time.

5. In 2013 the Appellant made an unsuccessful application to the Council for an LDC for use of the plot for purposes incidental to the enjoyment of a dwellinghouse. A subsequent appeal was successful in so far as it related to the part of the plot to the south of a privet hedge but unsuccessful in so far as it related to the part of the plot to the north of the privet hedge. The privet hedge, which crossed the plot from east to west to the north of the dwelling, was planted by the Appellant in 2000 and was removed in 2014. In that year the Appellant made another unsuccessful application to the Council for an LDC for use of the plot as incidental to the enjoyment of a dwellinghouse.

6. The Appellant's appeal against the refusal of the second application was also unsuccessful but the Inspector's decision was quashed in the High Court by The Honourable Mrs Justice Lang in an Approved Judgement dated 17 November 2016. Mrs Justice Lang concluded, amongst other things, that the Inspector had erred under the law by not considering the relevance of Section 55(2)(d) of the Town and Country Planning Act 1990 as amended. Section 55(2)(d) of the Act states that the use of land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse shall not be taken for the purposes of the Act to involve development of the land.

The main issue

7. With regard to the matter mentioned in paragraph 3 the main issue is whether, on 21 January 2014 the whole of the land was in use for purposes incidental to the enjoyment of the dwellinghouse and was therefore the curtilage of the dwellinghouse and, if not, whether the use of the land for purposes incidental to the enjoyment of the dwellinghouse has subsisted since before a date ten years before the date of the application, 21 January 2004.

8. The onus of proof in an LDC application is on the Appellant and, whilst his evidence does not need to be corroborated by independent evidence in order to be accepted, he must provide sufficient precise and unambiguous evidence to justify, on the balance of probability, the grant of a certificate.

Reasons

9. The Council has sought to argue that the plot is two distinct planning units; the curtilage of the dwellinghouse to the south of the former hedge and "...the field to the north". Mr Sohota, for the Council, was unable at the Inquiry to articulate how the land to the north of the hedge, at the date of the application, was used differently to the land to the south of the hedge. The land to the north of the hedge has not been used for any agricultural purpose, apart from being cut for hay, since its use as a smallholding ceased, and the plot has been in single and

separate ownership for many decades. There is, in addition, no material functional difference between the two 'parts' of the land which, as a matter of fact, is and was at 21 January 2014 one planning unit.

10. There is no authoritative definition of the term 'curtilage'; it must be judged on the facts of any given case. However, to fall within the curtilage of a building, land should serve the purpose of the building in some reasonably necessary or useful manner. This was established in *Sinclair-Lockhart's Trustees v Central Land Board [1950] 1 P&CR 195*. In *Dyer v Dorset CC [1988] 3 WLR 213* it was held that curtilage is a small area forming part and parcel with the house or building which it contained or to which it was attached. These and other authorities were reviewed in the judgement in *McAlpine v SSE [1995] JPL B43* which indicated, amongst other things, that curtilage is a small area about a building and that the curtilage land must be intimately associated with the building. The *McAlpine* judgement also reiterated the finding in the *Sinclair-Lockhart* judgment that curtilage land should serve the purpose of the building within it in some reasonably necessary or useful manner. The issue of 'smallness' was considered in *Skerritts of Nottingham Ltd v SoSETR [2000] EWHC 4565 (Admin)* with the finding that, as stated by the Council in this case, "...'smallness' varies with circumstances and is relative to the size of the building; a curtilage does not always have to be small".

11. The former hedge is a significant factor in this case. The Council maintains that it, along with two gates that they claim were fitted to gate posts across two gaps, formed a continuous barrier between the two parts of the land. The Appellant maintains that gates were never fitted in the gaps and that the two parts of the land have been consistently maintained since before the turn of the millennium. The Council has referred to an invoice from C Curtiss and Sons submitted to the Appellant in February 2000. The invoice has three principal items and is for the supply and erection of 350 metres of stock proof fencing, the supply and erection of 114 metres of post and rail fencing, and the supply and erection of two three foot softwood gates and one five foot softwood gate.

12. There is no dispute that the stock proof fencing was erected around the perimeter of the land; this being the fencing referred to in the quashed decision that was "...to keep the dogs in and the deer out". The post and rail fencing was erected along the line of the 'hedge'. The Council maintains that the two gates were hung on gate posts at the two gaps in the hedge whilst the Appellant asserts that these gates were used on land he previously owned on the opposite side of Five Ways Road. Photographic evidence indicates that the gaps in the hedge were wider than three feet; they would have needed to be to provide sufficient space for the passage of the four foot tractor mower that the Appellant purchased in 1998 to maintain the grass on his property. Furthermore, there is no photographic evidence to indicate that gates were ever fitted in the gaps. The Appellant's assertions regarding the gaps and the gates are plausible and can be accepted.

13. The post and rail fence was erected and the hedge planted to provide a degree of security at the dwelling following a physical assault on the Appellant during a burglary that caused him a serious head injury. This claim by the Appellant has not been contested. It is plausible, and necessary, that gaps were incorporated in the hedge/fence to provide access for maintenance of the land, and also that the gaps were wide enough for this purpose but narrow enough to prevent access by cars. In this regard there is a gate in the road frontage at the north-east corner of the land and if determined intruders were to gain access onto the land at this point the hedge/fence would have provided a 'second line of

defence'. There is no reason to doubt the Appellant's desire for this degree of security after the assault and his reason for introducing the hedge/fence. On the balance of probability there has not been, since the purchase of the property by the Appellant, any complete subdivision of the land; the partial sub-division that occurred was for a specific and reasonable purpose.

14. Early in his ownership of the property the Appellant established a vegetable patch in the south-west corner of the north part of the land; this use of albeit a small part of the north part of the land was clearly for a purpose that served the occupation of the dwellinghouse in a reasonably useful manner. The Appellant and his wife have owned a dog for many years and a neighbour to the north, Mrs Becque-Smith, stated in a statutory declaration made in 2014 that dog walking in the north part of the garden had been a daily activity since at least 1999. The use of the land for this activity has been useful to occupation of the dwellinghouse. Two benches positioned at the perimeter of the land, accepted in the quashed decision to "...have been there for a considerable time", suggests that time has also been taken to sit and enjoy the surroundings for their own sake. Evidence also indicates that the north part of the land has been used for recreational activities such as archery, pitch and putt and other lawn games.

15. The north part of the land is enclosed to the west, north and east by substantial hedgerows, apart from the gate at the north-east corner. It was noted at the site visit that during summer months the hedgerows provide an effective screen from outside of activity on the land, and a view over the land from the gate is only of about half of the land. Recreational activities are likely to have been predominantly during summer months and it is unlikely therefore that these activities would have been observed from outside or from passing vehicles. The only unrestricted view across the property is from upper windows in a dwelling to the north but these are to bedrooms so it is unlikely that activity on the land during waking hours would have been observed from these vantage points. The gate is to a straight section of a country road carrying fast moving traffic and, given also the absence of footways, is unlikely to be a position where anyone would stop and look across the land anything other than very occasionally. Local residents who gave evidence at the Inquiry claim not to have seen recreational activity on the land until 2013. There is no reason to doubt their claims but, given the screened nature of the land, it is plausible that they were simply unable to see the activity.

16. The perimeter hedges will also have prevented observation of mowing of the land during summer months. The Council has claimed that local residents have each observed that "...the grass was mown to a lawn-like condition at about Easter 2013". But grassed areas that have not been purposely created by turfing or seeding but by the improvement of paddock grassland do not reach a 'lawn-like condition' after one cut but only by being consistently and regularly cut over several years. The grassed areas at Glenthorne, both north and south of the former hedge, have not been seeded or turfed and have reached a 'lawn like condition'. There is no reason to doubt the Appellant's assertion that he has mown grassed areas at his property regularly and consistently since at least the millennium. Aerial photographs taken in several years since 2001 clearly corroborate this assertion as does a statement made in 2015 by Mrs Becque-Smith in which she states that "From 2009, the appeal site gradually received more and more mower attention...". The photographs also indicate that specimen trees have been planted in the north part of the land.

Conclusion

17. Evidence indicates that the appeal plot of about 1.4 hectares is a single planning unit that has been such since, and probably before, the Appellant purchased the property in 1996. The north part of the land is associated with the southern part historically and through ownership. After he purchased the property the Appellant set about creating a garden area, understandably, immediately around his dwelling. After this was established, an aerial photograph indicates that this was achieved by 1999, he commenced extending the garden area across the whole of the plot. An aerial photograph dated by the Appellant to have been taken in 2001 (this date is not contested) shows the north part of the land to be mown consistently with the southern part; the similarity of appearance across the whole plot is significant and important because it indicates a consistent mowing regime and an intention to create a garden across the whole plot.

18. Further aerial photographs indicate that the mowing regime established in 2001 and the regular cultivation of the land has continued since that time; the Council accepted at the Inquiry that the north part of the land is cultivated. The hedge/fence was introduced for a reasonable security reason whilst the ungated gaps provided unrestricted access to continue the mowing regime across the whole plot. It is inevitable that the parts of the garden close to the dwelling have been used more regularly than those further away but it is clear from the evidence that the whole of the land has been used to exercise dogs and that the north part of the land has been used for recreational activities. Though these activities have occurred intermittently there is no evidence to doubt, particularly given the summer screening of the land, the Appellant's assertion that they have occurred on a regular basis and dependant on the ages of his sons and grandchildren.

19. It is not necessary to establish a date on which the curtilage of the dwelling was first established. It is only necessary, if both appeals are to be successful on the issue of curtilage, to establish that the curtilage of the dwellinghouse at the appeal property was the whole of the plot on the date of the application, 21 January 2014. It was stated in closing on behalf of the Council that "...according to Mrs Becque-Smith, Mrs Sturdivant and Mr Blake the (north) land only became recognisable as a garden in around 2013...". Taking screening factors into account it is likely that these local residents only became aware in 2013 that the north part of the land was recognisable as part of the garden to the dwelling. But creating a garden is not in itself conclusive because the land must also serve occupation of the dwelling in a necessary or useful manner. Regular exercising of a dog is also not in itself conclusive but taken together with use of part of the land as a vegetable patch and use of the land for sitting out and recreational activities it is, on the balance of probability and on the facts of the case, reasonable to conclude that the whole of the plot, including the northern part, served occupation of the dwelling on 21 January 2014 in a reasonably useful manner. The size of the plot does not alter the overall conclusion reached. In this regard the dwelling is large and has substantial ancillary buildings associated with it, and is located in a countryside area where the size of its curtilage reflects its location.

20. The whole of the appeal land is a single planning unit and has been in a single ownership for the known past. On the date of the application the whole of the land, including the north part, was serving occupation of the dwellinghouse in a reasonable useful manner and was therefore the curtilage of the dwellinghouse. The use of land within the curtilage of the dwellinghouse for purposes incidental to the enjoyment of the dwellinghouse does not, given the provisions of Section

55(2)(d), involve development of the land. These circumstances subsisted on 22 January 2016, the date of the Appeal B application. The Appellant has provided sufficient precise and unambiguous evidence to justify, on the balance of probability, the grant of a certificate and, with regard to the matter mentioned in paragraph 3, both appeals therefore succeed.

21. For the reasons given above, and on all the evidence now available, the Council's refusal to grant a certificate of lawful development in respect of the use of the land for purposes incidental to the enjoyment of the dwelling house at Glenthorne, Five Ways Road, Hatton, Warwick was not, on both occasions, well-founded, and the appeals succeed. The powers transferred under section 195(2) of the 1990 Act as amended have been exercised accordingly.

John Braithwaite

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr R O'Flynn	Appellant

FOR THE LOCAL PLANNING AUTHORITY:

Mr T Leader	Of Counsel instructed by Ms C Gutteridge, Solicitor to Warwick District Council
He called	
Mr S Sahota	Development Management Team Leader at Warwick District Council

INTERESTED PERSONS

Mr P Blake	Local resident
Mrs V Sturdivant	Local resident

DOCUMENTS

1 Council's letter of notification of the Inquiry and list of those notified.
2 Documents relating to Application No. W.17.0401.
3 SoSETR and another v Skerritts of Nottingham Ltd [2000] All ER(D)245.
4 Denis Lowe v First SoS [2003] EWHC 537 Admin.
5 Summary of Document 3.
6 James v SoSE and Chichester DC (1991) 61 P & CR 234.
7 Letter and Statement by Mrs S Becque-Smith.
8 Document 12 relevant to Mr Blake's Statement.
9 Mr Blake's Statement.
10 Mrs Sturdivant's Statement.
11 E-mail letter dated 4 March 2016 from Mr B Palmer to Mr O'Flynn.
12 E-mail letter dated 27 February 2017 from Mr R Vause to Mr O'Flynn.
13 Local Planning Authority's Closing Submissions.
14 Closing Submissions of the Appellant.

The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 21 January 2014 and 22 January 2016 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The land was the curtilage of the dwellinghouse and the use did not involve development of the land

Signed

John Braithwaite

Inspector

Date: 05 October 2017

Reference: APP/T3725/X/15/3002141 and APP/T3725/X/17/3172164

First Schedule

Use of the land for purposes incidental to the enjoyment of the dwellinghouse

Second Schedule

Land at Glenthorne, Five Ways Road, Hatton, Warwick

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The Planning Inspectorate

Plan

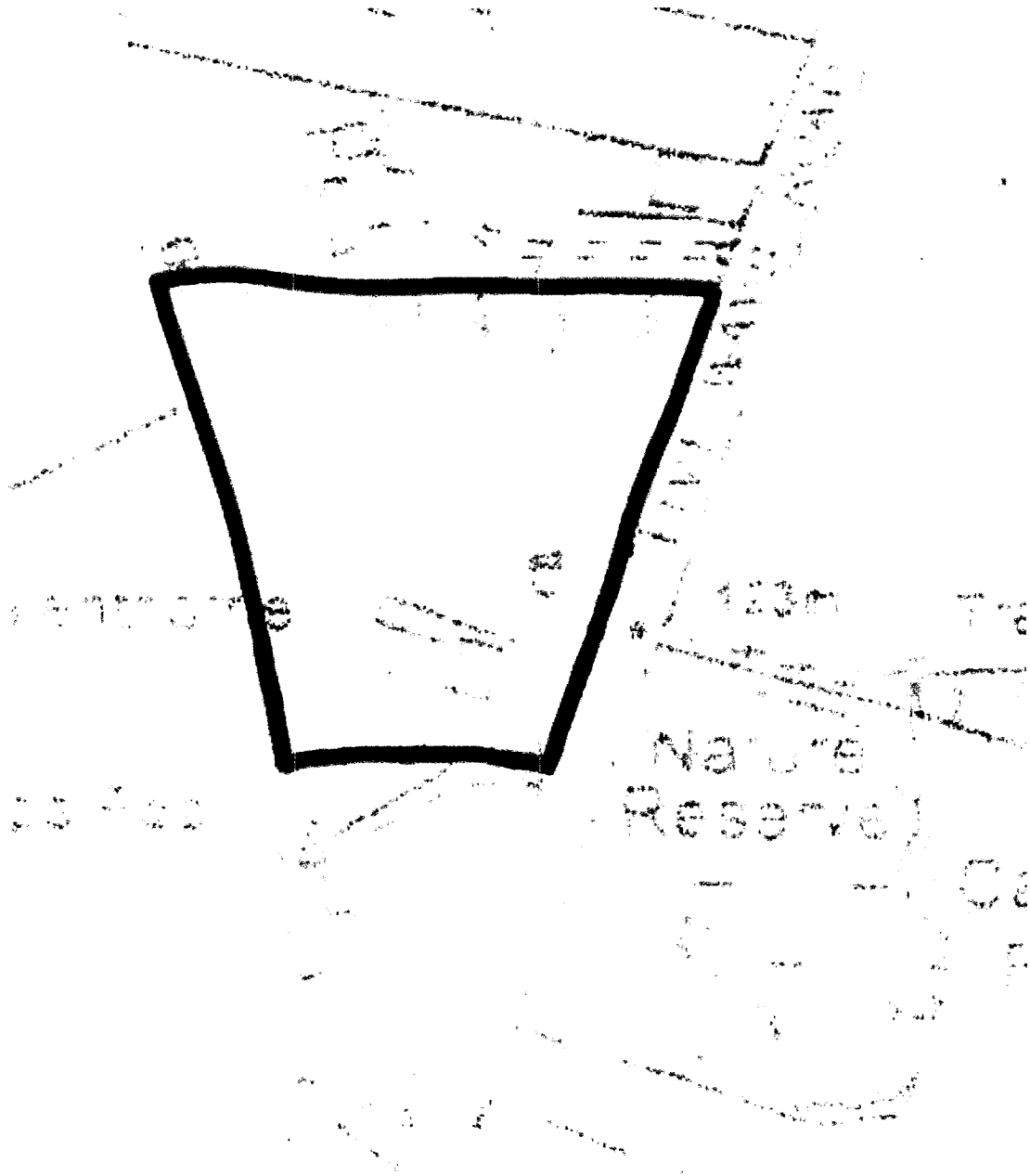
This is the plan referred to in the Lawful Development Certificate dated: 05 October 2017

by John Braithwaite BSc(Arch) BArch(Hons) RIBA MRTPI

Land at Glenthorne, Five Ways Road, Hatton, Warwick

Reference: APP/T3725/X/15/3002141 and APP/T3725/X/17/3172164

Scale: not to scale



APPENDIX 4

Appeal Decisions

Hearing held on 19 November 2013
Site visit made on 19 November 2013

by K Nield BSc(Econ) DipTP CDipAF MRTPI

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

Decision date: 27 December 2013

Appeal Refs: APP/F1610/C/13/2199101 (Appeal A) and APP/F1610/C/13/2199102 (Appeal B)
Land at Tally Ho Barn[1], Cloud Hill, Guiting Power, Cheltenham, Gloucestershire, GL54 5TY

- The appeals are made under section 174 of the Town and Country Planning Act 1990 (the Act) as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Ronald Bauer and Mrs Samantha Bauer against an enforcement notice issued by Cotswold District Council.
- The notice was issued on 23 April 2013.
- The breach of planning control as alleged in the notice is without planning permission, the erection of timber retaining walls, hard standings, hard surfaces, raised beds, compost bins, timber posts, greenhouses, a play fort and other domestic paraphernalia on the Land.
- The requirements of the notice are:
  (i) Permanently remove from the Land the timber retaining walls, hard standings, hard surfaces, raised beds, compost bins, timber posts, greenhouses, play fort and other domestic paraphernalia.
  (ii) Restore the land to its original levels, profiles and finish.
- The periods for compliance with the requirements are:
  Within 2 months of the date that the notice takes effect in respect of (i) above, and
  Within 3 months of the date that the notice takes effect in respect of (ii) above.
- The appeals are proceeding on the grounds set out in section 174(2)(a)[2], (b) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decisions: The appeals are dismissed and the enforcement notice upheld with correction and variation.

Appeal Refs: APP/F1610/C/13/2199103 (Appeal C) and APP/F1610/C/13/2199104 (Appeal D)
Land at Tally Ho Barn, Cloud Hill, Guiting Power, Cheltenham, Gloucestershire, GL54 5TY

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Mr Ronald Bauer and Mrs Samantha Bauer against an enforcement notice issued by Cotswold District Council.
- The notice was issued on 23 April 2013.
- The breach of planning control as alleged in the notice is without planning permission, change of use of the land from use as agricultural land to use for residential purposes.
- The requirements of the notice are to permanently cease the use of the Land for

[1] Also referred to as "*Tally Ho Barns*" in the evidence
[2] It was confirmed at the Hearing that the relevant fee for the deemed planning application under the ground (a) appeal was paid by Mr Ronald Bauer in respect of Appeal A.

residential purposes other than that permitted under the Town and Country Planning (General Permitted Development) Order 1995 as amended.
- The period for compliance with the requirements is within 3 months of the date that the notice takes effect.
- The appeals are proceeding on the grounds set out in section 174(2)(a)[3], (b) and (g) of the Town and Country Planning Act 1990 as amended.

Summary of Decisions: The appeals are dismissed and the enforcement notice upheld with variation.

Background

1. For descriptive purposes I will refer to the appeal land in both notices as "the notice land". The notice land amounts to some 7 hectares in open countryside within the Cotswold Area of Outstanding Natural Beauty (AONB). It is split into two areas by a classified road (Tally Ho Lane). The smaller southern triangular shaped part comprises a grassed area with a central clump of trees at a raised part of the area within which a wooden seating arrangement (and table) has been positioned.

2. The larger area of the notice land, to the north side of the highway, wraps around, but excludes, *Tally Ho Barn* (now converted to a dwelling) and associated buildings and a private garden area contained by a large hedge. Much of the larger northern area is at a slightly raised elevation above the highway and the dwelling and it is this area that contains most of the alleged operational development that has taken place. There is no dispute that all of the notice land (both areas to the north and south of Tally Ho Lane) identified on the plans attached to the notices lies outside the curtilage of the dwelling and I have no reason to differ.

The notices

3. The Appellants raised concerns in their evidence and at the Hearing about the wording of the alleged breaches of planning control in the notices. I will consider the submissions regarding the alleged use of the land first and then the submissions regarding the description of the alleged operational development.

Change of use (Appeals C and D)

4. The parties agree that the notice land identified on the plans attached to the notices identifies the correct planning unit. I see no reason to disagree with the views of the parties in this matter.

5. In respect of the notice alleging a change of use of the appeal land the Appellants state that the allegation is incorrectly framed and cannot be corrected without injustice. However, the Appellants confirmed that they were not claiming that the notice was either a nullity or invalid as it stood.

6. The substance of the contention might have formed a ground (c) appeal by the Appellants but that was not pursued. Nevertheless, I will deal with the matters

[3] It was confirmed at the Hearing that the relevant fee for the deemed planning application under the ground (a) appeal was paid by Mr Ronald Bauer in respect of Appeal C.

raised at this stage and, as they were raised in the written evidence provided by the Appellants, there is no injustice to the Council if I consider them.

7. In particular the Appellants state that the allegation that the whole of the land is now in residential use and has displaced a previous agricultural use is incorrect as there is an agricultural use continuing on the land in part. In those circumstances the allegation should be in terms of a change to a mixed use of both agriculture and residential uses. The Appellants further argue that due to the Council's description of the alleged breach they have been prevented from pursuing an appeal on ground (d) in respect of a mixed agricultural and residential use of the site for a period of 10 years and, consequently, they have suffered injustice.

8. There is no dispute that prior to the residential conversion of the barn to a dwelling the use of the appeal land was agricultural and I have no reason to disagree. The Appellants claim that the appeal land retains an agricultural use in part as it contains an orchard on a section of land towards the south-western boundary of the appeal site and also an area used for horticulture adjacent to Tally Ho Lane to the west of the dwelling curtilage. Section 336 of the Act, amongst other matters, defines "agriculture" as including both horticulture and fruit growing.

9. I accept the Appellants' contention that the orchard is of reasonable size and larger than could reasonably expect to be seen in a "back garden[4]". Nevertheless, it occupies a minor part of the overall notice land. The orchard appears to have been planted in the recent past for the enjoyment of the occupants of the dwelling. Similarly the area used for horticulture forms a fairly compact enclosed area with various vegetables grown in raised beds. The Appellants confirmed that neither of these activities formed part of any trade or business and the produce from both areas, surplus to their own needs, was simply distributed as gifts amongst the local community.

10. Notwithstanding the above, I observed at my visit that the majority of the appeal site comprised well maintained, cut grassland with some shorter cut pathways through. In the main the notice land has a strong sense of domesticity due to its managed appearance, strong boundary features against more unkempt agricultural land and woodland and the positioning of various features within it including an art installation, seating and items of play equipment. Taking all those factors into consideration, as a matter of fact and degree, I find that the character of the notice land has materially changed from agriculture to its use as a (residential) garden.

11. In view of the above finding I can conclude that the description of the alleged breach in the notice is accurate and I can determine the appeals on the basis of the allegation on the notice. I do not agree with the Appellants' contentions that they have suffered injustice through an incorrect description of the alleged use of the notice land or that the description of the alleged breach has prevented them pursuing a ground (d) appeal.

[4] As described by the Appellants' Counsel at the Hearing

Operational development (Appeals A and B)

12. In respect of the notice alleging various operational developments at the appeal site the Appellants contend that the notice was not precise as to what was referred to by the Council in the phrase "domestic paraphernalia". They further contend that items that might normally be considered falling within such a description had not been positioned on the land. The Council had (later), in its written statement (at paragraph 4.13), referred to the domestic paraphernalia as "*what appears to be an art installation, seating areas, poultry pens and play equipment other than the play fort...*". In response to the Council's description of the individual matters of concern the Appellants contended at the Hearing that none of the items now identified by the Council constituted "development" (as defined under s55(1) of the Act) for which planning permission was required.

13. I agree with the Appellants to the extent that, in the context of a list of items of alleged operational development specified by the Council in the notice, the phrase "domestic paraphernalia" lacks precision as to what it actually refers. The specific items referred to by the Council, with the exception of the single bench in the northern notice land and the poultry pens, would, due to their size and weight, go beyond what would readily be understood as items of "domestic paraphernalia" which, to my mind, would usually refer to items having a temporary use in relation to residential activity and which could easily be removed, re-sited and stored.

14. The Council has clarified in its evidence the items it considered fell within that description but I consider these should have been itemised clearly in the notice. Nevertheless, the Appellants have been made aware of these items of concern to the Council and have provided evidence in respect of them both in their statement and at the Hearing. I have powers available to me under s176(1) of the Act to correct the notice and I consider that is a proportionate measure to take in this case and will not cause injustice to the Appellants.

15. If I should conclude in the case of Appeals C and D that there has been a change of use of the notice land from agriculture to residential use and (on the evidence before me) dismiss those appeals then, by implication, there would be no permitted residential use of the notice land and, in consequence, items deposited on the land in connection with a residential use would have no basis for their continued use for such purposes on the notice land. Notwithstanding that I now intend to consider each of the individual items that the Council has identified as "domestic paraphernalia" to determine whether or not they constitute "development".

16. I noted at my visit that the art installation comprised a group of five substantial plastic figures (in my view intended to represent a "life-sized" family group of adults and children) placed on a stone and concrete plinth. The figures could be removed individually although particularly the larger ones would be heavy and, to my mind, difficult to move and manoeuvre easily. The intention of the installation on its base appeared to be a feature that would be positioned and left *in situ* throughout the year providing a degree of permanence to it rather than a feature that would be easily cleared away and repositioned at a later date. The figures are held in place individually by steel tubes inserted into the base of the figures which are positioned in holes drilled in the plinth. I was

informed that the steel tubes could if necessary, be removed both from the base and the figures. Nevertheless, the constructed base with the substantial figures positioned on it is, to my mind, a single feature comprising an art installation and constitutes operational development.

17. In respect of the seating areas referred to by the Council I noted two separate seating areas within the notice land. The most substantial is located in the southern part of the notice land on the south side of Tally Ho Lane. That comprises substantial, heavy, timber benches and a large wooden table positioned on a hard base which had been laid to the ground. These wooden items are not fixed to the ground and could, therefore, be moved, albeit with some difficulty (probably requiring more than one person and/or machinery) due to their size and weight. I have no doubt they are intended to remain in position throughout the year and would through time achieve a degree of permanence. In addition, no indication was provided to me that they were actually removed from their positions within the site in the event of adverse weather or for other reasons. Nevertheless I find, as a matter of fact and degree, that the seating (and table) located to the south side of Tally Ho Lane is not operational development requiring planning permission.

18. Within the northern area of the notice land I noted a wooden bench seat which did not appear to be positioned on a prepared hard surface. In my view that could be moved easily and relocated if necessary. That item of seating would not constitute operational development.

19. A small area of the notice land to the east of the dwelling is fenced and contains a number of poultry pens and small wooden structures to house the poultry. I consider that the pens and structures could easily be relocated if required. I do not regard this area as comprising operational development.

20. Finally, the play equipment (other than the play fort which is individually specified on the notice) I was referred to was a wooden structure (in the form of a space rocket) which a child/children could use as a den. The structure is positioned in a slightly elevated position on the land visible from Tally Ho Lane. I consider that it was sited such that the intention was for it to remain as positioned throughout the year and would no doubt achieve a degree of permanence through time. Although it was not entirely clear at my visit I would expect that the structure could be moved and relocated without being dismantled if required. In those circumstances I find, as a matter of fact and degree, it does not constitute an item of operational development.

21. As a matter of fact and degree I find that, of the specific items identified by the Council as "domestic paraphernalia", only the art installation constitutes an item of operational development and should be specified in the notice as such. Consequently, I consider that both the allegation and requirement in the enforcement notice in respect of operational development should be corrected to refer specifically to the art installation. I will use the powers available to me under s176(1) of the Act to vary the notice and I consider that to do so will not cause injustice to the Appellants.

The appeals on ground (b) (Appeals A, B, C and D)

22. Following my detailed assessment above I can deal with the matters raised on this ground reasonably succinctly. I will consider firstly the Appellants' contentions in respect of the alleged use of the land.

Change of use (Appeals C and D)

23. The Appellants contend that in the terms the notice (regarding the alleged change of use) was issued there has not been a change of use as a matter of fact. I dealt in some detail above with the Appellants' claims that the allegation in the notice was incorrect and found that as a matter of fact and degree there had been a change of use of the appeal land from agriculture to residential use.

24. In the light of my findings above the ground (b) appeals in respect of Appeals C and D fail.

Operational development (Appeals A and B)

25. In respect of the alleged operational development (Appeals A and B) the Appellants contend that the erection of domestic paraphernalia has not occurred as a matter of fact. I found above that the art installation considered by the Council as "domestic paraphernalia" should be more correctly specified individually in the notice as operational development and the notice could be varied accordingly to specify the individual items of concern to the Council without injustice.

26. The appeals on ground (b) in respect of Appeals A and B fail.

The appeals on ground (a) (Appeals A and C)

Main issues

27. The main issues in this case are :

(i) the effect on the character and appearance of the locality including the Cotswold Area of Outstanding Natural Beauty (AONB) within which the site is located and on the setting of nearby Listed Buildings, and

(ii) whether there are any other material considerations that weigh in favour of the appeal scheme.

Reasons

28. *Tally Ho Barn* and an associated and adjacent building, both located outside the appeal site itself, are identified as Grade II Listed Buildings. There are also Listed Buildings (*Gazeley View Cottage* and *Southwold*) close to the western appeal site boundary on the opposite side of Tally Ho Lane. I am required[5] to give special consideration in my decisions to the setting of Listed Buildings. There is no dispute in this case that the alleged development in both notices does not affect the setting of any of the Listed Buildings indicated above and I see no reason to reach a different view.

[5] Section 66 of the Planning (Listed Buildings and Conservation Areas) Act 1990

29. The notices refer to policies NHE1 and NHE4 of the Gloucestershire Structure Plan (GSP) which were extant at the time the notices were issued. However the GSP has subsequently been revoked and the stated policies are not now relied upon by the Council.

30. The Framework[6] indicates that recognition of the intrinsic character and beauty of the countryside forms part of the core planning principles which underpin decision making. Taken together, paragraphs 109 and 115 of the Framework, amongst other matters, require the planning system to contribute and enhance the natural environment by protecting valued landscapes and state that great weight should be given to conserving landscape and scenic beauty in AONBs, which have the highest status of protection in relation to those matters.

31. I found above that, taken as a whole, the character of the notice land has materially changed from agriculture to use as a residential garden. The items of operational development that have taken place in the notice land considered both individually and collectively have contributed to the change of character of the appeal site within the AONB.

32. The Appellants contend that the Council has taken a "broad brush approach" to its assessment of the items of operational development in considering their cumulative effect on the character and appearance of the locality and AONB rather than considering whether each individual feature is harmful in its own right and assessing the degree of any harm identified. The Appellants further argue that the Council has placed too much emphasis on whether individual items of operational development that are alleged are visible from the public domain.

33. The change of use of the two areas of the notice land to a residential use has altered the former agricultural landscape in a way that does not conserve the landscape or scenic beauty of this part of the AONB. Taken as a whole the change of use does not accord with the aims of the Framework in these respects. Within that overall assessment I regard some of the operational development that has taken place within the notice land as having a greater impact on the character and appearance of the landscape than others.

34. The art installation positioned on its plinth and the play fort, in particular, appear as substantial, incongruous features in the landscape viewed from points along the highway and cause significant material harm to the character of the locality. The small greenhouse to the north-east of the dwelling also projects into the open part of the notice land without any material functional need for it to be located in that position. I noted in that regard that the greenhouse and several small adjacent soil beds were not utilised at the time of my visit.

35. A substantial area of land to the east side of outbuildings at *Tally Ho Barn* appears to have been levelled at some time and I was informed it had a surface of rubber granules laid on top of sub-soil. The area has a gated access from the highway. At my site visit it was indicated by the parties that the area had been used previously as a ménage although without the benefit of planning permission. The residential uses of this area of land for vehicle parking and the storage of containers are visible from the public domain over a wall and at the

[6] National Planning Policy Framework (the Framework)

gateway from the adjacent highway and they have a materially harmful effect on the open land beyond in the AONB.

36. Land to the west side of the dwelling adjacent to the highway comprises a former small quarry within which there has been engineering operations to provide a level parcel of land used for horticulture with raised vegetable beds and some netted fruit cages. A substantial, well designed, traditional greenhouse has been constructed in a slightly elevated position when viewed from the highway. It sits close to an embankment which leads towards the dwelling and which has a number of mature trees growing both on and around it.

37. Views of this area from the highway further to the west are largely screened both by a spinney of trees and the orchard planting. Nevertheless, this area is clearly visible from the adjacent highway over a small wall and also from the public rights of way to the west and south. Although it is viewed from Tally Ho Lane against the background of the embankment and the backcloth of trees the development is prominent and has a domestic scale and a residential character.

38. Taking all the above factors into consideration, I consider that the operational development specified on the notice (including the additional item I indicate should be specified on the notice) contribute both individually and cumulatively to the domestic appearance of the notice land and is at odds with the agricultural context of the surrounding area. The items of operational development do not conserve the landscape or scenic beauty of this part of the AONB, to which I attach great weight, and they, therefore, conflict with the aims of the Framework.

Other matters

39. The Appellants' advocate indicated that the Appellants have relocated to the UK and, consequently, are not wholly familiar with the UK planning system. Consequently, they were taken by surprise by the Council's opposition to the developments that had been undertaken on the notice land in their ownership. Nevertheless, it was stated that they welcomed the opportunity to regularise the disputed matters. I have taken these matters into account but not attached weight to those considerations in reaching my decision.

40. In respect of the play fort a time limiting condition which would ensure its removal after a period of 3 years was suggested by the Appellants. It was suggested that would be acceptable to them in the event that a permanent consent for the play fort was not forthcoming. The Appellants explained that the equipment was provided for their son now aged 7 but he would have outgrown it by the time he was 10.

41. However, I found above that the play fort was an incongruous development in its present location and I consider that its retention in that position for such a period would be harmful to the landscape and character of the locality and the AONB. Consequently I will not attach that condition. Nevertheless the Council indicated that it is willing to extend, by a limited extent, its period for compliance with the notice as I outline below in the ground (g) appeal and I consider that is an appropriate way to deal with this matter.

42. None of the other matters raised alters my view as to the main issues on which these appeals on ground (a) turn.

Conclusion on the ground (a) appeals

43. I found that the change of use of the land as a whole from agricultural to residential was harmful to the locality and the AONB in conflict with the Framework.

44. I found that the items of operational development specified in the notice (with the variations I have indicated should be made) individually and collectively are materially harmful to the locality and the AONB. The appeals on ground (a) in respect of Appeals A and C fail.

The appeals on ground (g)

45. The appeals on ground (g), simply put, are that the period allowed for compliance with the notice is too short. In the Grounds of Appeal the Appellants requested a period for compliance of 9 months in respect of requirement 5(i) of Appeals A and B and 11 months in respect of requirement 5(ii) of Appeals A and B and the requirement of Appeals C and D.

46. At the Hearing the Council stated that they had no objection to the extension of the periods for compliance to the time periods suggested by the Appellants and I have no reason to differ in respect of the matters that are not permitted. To that limited extent the appeals on ground (g) succeed.

Formal Decisions

Appeal Refs: APP/F1610/C/13/2199101 (Appeal A) and APP/F1610/C/13/2199102 (Appeal B)

47. I direct that the enforcement notice be corrected by:

(i) the deletion from paragraph 3 of the words "a play fort and other domestic paraphernalia on the Land" and the substitution therefor of the words "a play fort and art installation on the Land", and

(ii) the deletion from paragraph 5 of the words "and other domestic paraphernalia" and the substitution therefor of the words "and art installation".

I direct that the enforcement notice be varied by:

(i) the deletion from paragraph 5(i) of the words "within 2 months" and the substitution therefor of the words " within 9 months" and

(ii) the deletion from paragraph 5(ii) of the words "within 3 months" and the substitution therefor of the words " within 11 months".

48. Subject to above correction and variation the appeals are dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Appeal Refs: APP/F1610/C/13/2199103 and (Appeal C) and APP/F1610/C/13/2199104 (Appeal D)

49. I direct that the enforcement notice be varied by the deletion from paragraph 5(i) of the words "within 3 months" and the substitution therefor of the words "within 11 months".

50. Subject to above variation I dismiss the appeals and uphold the enforcement notice. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Kevin Nield

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Gwion Lewis of Counsel	Landmark Chambers, 150 Fleet Street, London
Catherine Jessop, Solicitor	HMG Law LLP, 32 Crown Walk, Bicester

FOR THE LOCAL PLANNING AUTHORITY:

Colin Davies	Enforcement Officer, Cotswold District Council
Andrew Moody BSc(Hons), Dip TP, MRTPI	Senior Planner, Cotswold District Council

DOCUMENTS

1 Copy of letters of notification from the Council of arrangements for the Hearing and list of persons notified
2 Copy of Planning application form for Application 11/02926/FUL dated 22 June 2011
3 Copy of Planning application form for Application 11/03782/FUL dated 8 August 2011
4 Appeal Decision Ref: App/F1610/C/04/1146745 Land at Peewits House, Peewits Hill, Bagendon, Gloucestershire
5 Extract from [2008] JPL Issue 8 Pages 1224 - 1227: Ministerial Planning Decisions – North East Derbyshire District Council and Mrs Pope and Mr Preston

APPENDIX 5

Appeal Decisions

Hearing held on 27 October 2009
Site visit made on 27 October 2009

by Chris Hoult BA BPhil MRTPI MIQ

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

The Planning Inspectorate
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Temple Quay House
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Decision date: 30 November 2009

Appeal Ref: APP/G2435/C/09/2106755 & 2106758
Land at 3 Francis Lane, Newton Burgoland, Leicestershire, LE67 2SD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr and Mrs I Arnold against an enforcement notice issued by North West Leicestershire District Council.
- The Council's reference is 05/00230/UD.
- The notice was issued on 15 May 2009.
- The breach of planning control as alleged in the notice is, without planning permission, the change of use of agricultural land to land for use as a private garden having a domestic character.
- The requirements of the notice are: (1) cease using the agricultural land as domestic garden; (2) permanently remove boundary hedges and fences marked in red on the enclosed plan; (3) permanently remove the chicken shed and coops; (4) permanently remove the compost bin and heaps; (5) permanently remove any other paraphernalia of a domestic character; (6) reinstate the land fit for the purpose of an agricultural use.
- The period for compliance with the requirements is three months from when the notice takes effect.
- The appeal is proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended ("the 1990 Act"). Since the prescribed fees have not been paid within the specified period, the application for planning permission deemed to have been made under section 177(5) of the 1990 Act does not fall to be considered.

Preliminary matters

1. Written applications for costs were made by the Council against the appellants and vice versa. Following clarification of the position regarding these applications at the hearing, they were, with the parties' agreement, withdrawn. There are therefore no costs applications to consider. Although Mr Evans of Manor Farm (the owner of the land subject of the notice) is not on the attendance list, he was present at the site visit. The appellants point out that, since they do not own the land, its address should properly be "Land off Main Street". For clarity, I adopt the address given on the enforcement notice.

Decision

2. I direct that the enforcement notice be varied by deleting, in Section 4, requirements 4 ("Permanently remove the compost heap and bins.") and 5 ("Permanently remove any other paraphernalia of a domestic character."). Subject to these variations I dismiss the appeal and uphold the notice.

Background

3. The appeal property is one of a sequence along the south side of Francis Lane, to the rear of which is a large field which is used as grazing land. Land along the boundary of this field adjacent to properties' rear gardens was sold by the farmer, Mr Evans, to owners as individual plots. In the case of a number of them (including the appeal property), these have now been enclosed by fences and hedges. Planning applications for a change of use to garden land and, subsequently, for a change of use to allotments and tree planting in respect of nos. 1 – 5 and 7a were refused, the latter being dismissed on appeal[1]. Enforcement notices were then issued requiring that the use of the plots as garden land cease. These were appealed and those in respect of nos. 1, 2, 4, 5 and 7a were considered in August 2009[2].

4. The appeals were on a variety of grounds, including grounds (b), in the case of nos. 2 and 5, and ground (c), pleaded in all the appeals. The appeals on these grounds were dismissed. The appeal before me could not be considered at that time but follows on from them. However, given that these decisions are an important material consideration, my approach to it is to explore whether there are, with regard to these grounds, material differences in the circumstances of this property from those of the others. The nub of the appellants' case in relation to the ground (b) appeal is that a change of use to use as a garden has not occurred as a matter of fact, as the plot remains in agricultural use. The ground (c) appeal concerns itself more with the steps required by the notice, arguing that the fences and hedges required to be removed do not constitute development in breach of planning control.

Ground (b) appeal

5. The plot is small (roughly 13m square) and is used for rearing hens (8 in number at the time of the hearing) and growing vegetables and soft fruit. Strips of mown grass which lead from the rear garden provide access to the hen house and enclosure and the vegetable plot. One key difference between no. 3 and the other properties is that, while the plot is enclosed and occupied by the appellants, it has not been sold to them. It remains in the ownership of Mr Evans and, on the evidence given at the hearing, is occupied by them rent-free on the basis of an informal "verbal" agreement.

6. The definition of "agriculture" for purposes of the 1990 Act is set out in s336 of the Act. Under it, agriculture includes horticulture and the keeping of livestock. No minimum area in which activities might be carried on is prescribed and the conduct of a trade or business is not required. A narrower definition of "agricultural land" can be found in Part 6 of Schedule 2 to the Town and Country Planning (General Permitted Development) Order 1995 as amended ("the GPDO"). It requires that it be used for the purposes of a trade or business. However, that definition is solely for purposes of determining whether the permitted development rights set out in the Order apply and they apply in any event to units of greater than 0.4Ha in area.

7. Photographic evidence of the plot dates from earlier in 2009 than the date on which the notice was issued. However, the evidence given at the hearing

[1] Ref. APP/G2435/A/06/2028809
[2] Refs. APP/G2435/C/09/2101198, 2101199, 2101793, 2101794, 2101298, 2101299, 2100303 and 2100304

indicates that its layout and the overall level of activity was largely the same as at the time of the hearing. The appellants said at the hearing that they devote a considerable amount of time to the upkeep of the plot and rearing the hens, on a year-round basis. They explained that this can involve work similar to that of a farmer, for example, in relation to keeping the hens free from disease. Produce is distributed among their family and in the locality, including the local school, and the eggs are of good quality and much sought-after.

8. Other plots are used for growing vegetables and one contains a hen enclosure. Typically, these are part of an area which is otherwise laid to grass or lawn. Their character is that of extensions to domestic gardens, in spite of being used to a degree productively. The previous Inspector commented on their limited productive use in support of his view that this did not qualify them to be regarded as in agricultural use. The appeal plot differs in that it is wholly productively used. It is, however, contiguous with the existing garden and is on the same small scale and reads as an extension to it rather than as a use which is more closely associated with the farm holding or with the wider use of the field as grazing land. While it is separated from the garden by a tall hedge, the majority of the plots have retained a boundary to existing gardens.

9. Whether, in terms of how it is used, the plot is in agricultural or domestic use comes down to an individual judgment on the basis of fact and degree and I accept that this might be more finely balanced than with the other plots. More hens are kept than were observed at no. 5 by the previous Inspector, and the vegetable plot is fully utilised, but the operation remains domestic in scale. The appellants argued passionately at the hearing that they were engaged in farming, as opposed to merely "gardening" or something that might be described as a "hobby". However, it is not uncommon for domestic gardens to extend to growing vegetables and the keeping of hens and for such activities to be divided off from the more recognisably "domestic" part of the garden. Moreover, a hobby or lifestyle activity does not change its nature because it is pursued intensively or with a degree of professionalism or technical expertise.

10. The fact that the plot continues to be owned by the farmer has only a limited bearing since this ground of appeal is concerned with the facts relating to the character of the use. The appellants confirmed that they occupy the site as individuals and not as employees of Mr Evans or under any form of licence from him. The working and upkeep of the land and the planting of hedgerows has been carried out entirely by them. While I have some sympathy for the position they are in, having invested time and money in these activities, that cannot of itself justify an argument that, on the facts, the land remains in agricultural use. For the reasons I have given, I consider that the character of its use is that of a domestic garden and that a material change of use has taken place as a matter of fact. The ground (b) appeal therefore fails.

Ground (c) appeal

11. The fence is of post and wire construction and employs stockproof netting. The hedge is of hawthorn and is now well established. As a new field boundary, I acknowledge that it is in keeping with its rural setting. The appellants argue that that was, at least in part, the reason why it was planted. However, an argument for retaining the hedge on account of its appearance can only be considered under a ground (a) appeal and none has been made. The

appellants' case for retaining the hedge and fence under this ground is that they are either not development or are permitted development and that their installation does not amount to development in breach of planning control.

12. In considering the previous appeals on this ground, the Inspector made reference to the *Murfitt*[3] and *Somak Travel*[4] cases and they are plainly relevant to this appeal. They establish the principle that operations which have taken place to facilitate an unauthorised change of use can be required to be removed even though they may, of themselves, be immune from enforcement action or not development at all. The Inspector extended this principle to apply to operations permitted by the GPDO. No evidence was brought to bear by the appellants that disputes the authority provided by these cases.

13. On the available evidence, the fence and the hedge have a functional purpose associated with enclosing the plot. In a field which has been used for grazing cattle, their purpose is keep livestock out of the plot and to give a degree of protection and privacy to the appellants and their animals. The stockproof fencing has performed this function as the hedge has matured but, now that it has outgrown the fence, it will be the primary means of providing the necessary protection. The fence and the hedge do not demarcate an ownership boundary, not least because there is no separate ownership of the plot. In so far, therefore, as they fulfil the purpose I have described, they have facilitated the unauthorised change of use. They are part and parcel of the breach of planning control which has occurred and they can be required to be removed. The ground (c) appeal therefore fails.

Other matters

14. The appellants argue that there are no compost heap or bins and no other domestic paraphernalia on the plot. That accords with the available evidence in so far as it relates to the time of issue of the notice and I did not observe any such items at the time of the hearing. The Council's evidence did not indicate otherwise but it suggested at the hearing that such references could be viewed as a "catch all" requirement in case the appellants were to consider bringing such items on to the land. However, the requirements cannot deal with hypothetical instances of unauthorised development. I therefore vary them to delete these references.

Conclusions

15. For the reasons given above I conclude that the appeal should fail. I therefore uphold the enforcement notice with variations.

C M Hoult

INSPECTOR

[3] *Murfitt v SSE and Another* [1980] JPL 598
[4] *Somak Travel v SSE and LB of Brent* [1987] JPL 630

APPEARANCES

FOR THE APPELLANT:

Mrs M Arnold	Appellant
Mr D Spence	Farmer and appellant's father

FOR THE LOCAL PLANNING AUTHORITY:

Ms P Perry BA (Econ)(Hons), Dip PI & Env	Planning Enforcement Officer

INTERESTED PERSONS:

Ms K Stirk	Local resident
Mr B Hazel	Local resident
Mr D Luckman	Local resident
Mr and Mrs Insley	Local residents
Mr Evans	Landowner (site visit only)

DOCUMENTS

1 Letter from Mrs R Cunningham, 9 Francis Lane, Newton Burgoland, dated 23 October 2009, requesting copy of decision

PHOTOGRAPHS

1 Coloured photo of appeal site submitted by the Council