



Appeal Decision

Inquiry held on 18 October 2023

Site visit made on 17 October 2023

by K R Seward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 13 November 2023

Appeal Ref: APP/J1535/X/20/3257300

Meadgate Works, Meadgate Road, Nazeing, Waltham Abbey EN9 2PD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Lignacite Ltd against the decision of Epping Forest District Council.
 - The application ref: EPF/0890/19 CLD, dated 3 April 2019, was refused by notice dated 15 April 2020.
 - The application was made under section 191(1)(c) of the Town and Country Planning Act 1990, as amended.
 - The failure to comply with any condition or limitation for which a certificate of lawful use or development is sought is described as "existing hours of use of the site from 5am to 12am Monday to Saturday."
 - This Decision supersedes those issued on 18 January 2021 and 10 March 2022, both of which were quashed by consent order endorsed by the High Court.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the extent of the matter constituting a failure to comply with a condition which is found to be lawful.
2. Notwithstanding the above, I emphasise that the relevant condition is not expunged. In effect, the condition continues in force but with revised hours of permitted operations for the factory unit.

Preliminary Matters

3. As noted above, the two previous Inspector's decisions were quashed by consent order as endorsed by the High Court and remitted for redetermination. Both decisions had followed the written representation appeal procedure. My decision is taken completely afresh and follows a Public Inquiry held in person on 18 October 2023 at which the parties were represented by Counsel.
4. In light of the parties' estimated timings on the duration of witness evidence, the Inquiry was originally scheduled for 2 days with the option of closing submissions being heard remotely on the afternoon of 27 October 2023.
5. By the time of the Inquiry, the Council had reviewed and revised its position in the light of all the evidence, judgments, and submissions to conclude that the hours of operation (i.e., 5am to 12am, Monday to Saturday) have been in continuous use for a period of 10 years. To that extent, the Council accepts that the appellant's case for breach of condition 4 of planning permission

- EPF/0361/90 has now been made out. In consequence, the Council's role was limited to assisting the Inquiry after making a short opening statement.
6. Notwithstanding the change in the Council's position, I must still consider the evidence before me to decide whether it warrants the grant of a LDC as sought. Accordingly, the appellant proceeded to call its 4 witnesses whose evidence was taken on oath or affirmation. Given the position taken by the Council, there was no cross-examination although each witness answered my questions. Evidence was concluded on day 1 and the Inquiry closed.
 7. The day after the Inquiry closed, I was informed by the Inspectorate's case officer that a neighbouring resident, Mr Perry Wooster, wished to speak at the Inquiry. Mr Wooster claimed not to have received the notice of Inquiry until 18 October 2023. The public notice of Inquiry circulated on 15 September 2023 gave the incorrect Inquiry dates, but corrected notices were issued on 6 October 2023. I am assured that notices were published as required albeit Mr Wooster did not see the site notice until alerted to its presence when it was too late.
 8. When an Inquiry is scheduled, there is no guarantee that it will last for the number of days allotted. It is incumbent upon any member of the public wishing to speak to attend at the opening of the Inquiry to register an interest in doing so. Mr Wooster had not served a statement of case. There was no right to appear which is at the discretion of the Inspector. Mr Wooster requested instead that his email and affidavit (with exhibits) be accepted along with an affidavit made by his father, Mr William Wooster. He also sought to introduce video footage taken in 2022 and 2023.
 9. It is noted that the affidavits were submitted in opposition to a previous similar application made by the appellant under reference EPF/2613/18 CLD which was refused by the Council on 23 January 2019. No appeal was brought against that decision. Instead, the appellant submitted a fresh application in an attempt to overcome the Council's concerns. It is the refusal of that later application, dated 3 April 2019, which is the subject of this appeal and Decision.
 10. The Council's delegated Officer's report refers to the affidavits contesting the claimed hours of operation and Mr Eastwood has commented in response for the appellant. When I queried during the Inquiry why these affidavits had not been provided, it emerged that they were not re-submitted in the current application or appeal.
 11. After consulting the parties on the options, including the possibility of re-opening the Inquiry, I have agreed to accept the written submissions from Mr Wooster (including affidavits) as late evidence. This was on the basis that exceptional circumstances exist. The video footage has not been accepted and is not relevant because it post-dates the LDC application. Complaints over noise and disturbance to neighbouring occupiers are also not relevant to the issue of lawfulness before me and cannot influence my decision.
 12. Having given the parties opportunity to reply in writing to Mr Wooster's submissions, a further statutory declaration made by Mr Eastwood was produced in response. My findings in this case have been reached without attributing less weight to Mr Wooster's evidence due to his 'previous character', as so invited by Mr Eastwood. For the avoidance of doubt, I have taken into account all the written material submitted post-Inquiry by Mr Wooster and Mr Eastwood insofar as relevant and material to my decision.

13. I undertook an unaccompanied site visit the day before the Inquiry, viewing the site from the public highway only. I declined the appellant's offer to visit the factory to see concrete batch production in operation as it would not assist in my determination. The application relies upon matters of fact and law which would not be influenced by anything that could be seen at the site. With the agreement of the parties, no accompanied site visit was undertaken.
14. As identified in the heading above, the activity for which the LDC is sought is described in the application as "*existing hours of use of the site from 5am to 12am Monday to Saturday.*" This description lacks precision as it does not identify the specific use applied for, whether the use relates to the whole or part of the site or mention the planning permission and condition claimed to be breached. After the conclusion of evidence, I led a discussion with the advocates to ascertain the precise terms in which a LDC should be issued if the appeal succeeds. I return to this below.

Background

15. Planning permission was granted on 7 December 1990 under Council ref: EPF/361/90 for the 'redevelopment of factory for manufacture of building blocks'. The grant of permission was subject to 5 conditions. Condition no. 4 states:

Work shall only be carried out on, and deliveries made to and from the site between the hours of 7am and 6pm Mondays to Fridays and between 8am and 1pm on Saturdays. No work shall be carried out on or deliveries made to and from the site on Sundays or Bank Holidays.

16. Application is made for a LDC on the grounds that works have been carried out at the factory in breach of condition for the requisite period such that the hours of operation from 5am to 12am Monday to Saturday have become lawful.
17. For the avoidance of any doubt, it was confirmed at the start of the Inquiry that no LDC is sought in respect of deliveries to and from the site in breach of the permitted hours within condition 4. The application solely concerns 'works'. Furthermore, the application does not include works carried out on the site on Sundays or Bank Holidays.
18. Counsel for the appellant also confirmed that the LDC is sought for the use of the factory rather than the site outlined in red on the application plan.

Main Issue

19. The main issue is whether the Council's refusal to issue a LDC was well-founded.
20. That turns on whether the appellant can demonstrate, on the balance of probabilities, that at the time of the application (i.e., 3 April 2019) the condition has been breached continuously for any 10-year period, without significant interruption, so as to be immune from enforcement action, and that any such right has not been lost through some event sufficient to terminate it.
21. A breach of condition is subject to a 10-year immunity period under section 171B(3) of the 1990 Act. Pursuant to section 171B(3) no enforcement action may be taken after 10 years beginning with the date of the breach.

Reasons

22. For the purposes of the 1990 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 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.
23. In order for a LDC to be granted under section 191 of the 1990 Act, the burden of proving relevant facts in this appeal rests on the appellant, and the test of the evidence is the balance of probabilities.
24. Paragraph 006 of the *Lawful Development Certificates* section of the national Planning Practice Guidance advises 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. This approach is well recognised and supported by caselaw.
25. Since the first Inspector's decision was taken there has been clarification on the 10-year period that may be considered in a breach of condition case. The judgments of the High Court in *Nicholson v SSE & Maldon DC* [1998] JPL 553 and *Ellis v SSCLG* [2009] EWHC 634 (Admin) indicate that the failure to comply with a condition must be in existence at the date of the LDC application. However, that position (as taken by the first Inspector) was not followed by the High Court in *R (Ocado) v Islington LBC* [2021] EWHC 1509 (Admin). All are High Court judgments but, the reasoning of Justice Holgate in *Ocado* is to be preferred as the most recent judgment dealing specifically with the point.
26. Paragraphs 162 to 164 of *Ocado* read:

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.

163. 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..... 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..... 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.

27. Therefore, it makes no difference that the condition breached is a negatively worded condition imposing an ongoing restriction on use. The key question is whether there had been a breach of condition throughout *any* 10-year period such that immunity from enforcement action had accrued and that the right remained in existence at the date of the LDC application.
28. The breach does not have to be continuing at the date of the LDC application to become lawful so long as there has not been a supervening event, such as abandonment or a material change in use.

Evidence before the Inquiry

29. As set out above, the appeal concerns the operating hours of a factory unit in breach of condition. The factory is used for the manufacture of building blocks.
30. The appeal is supported by statutory declarations from four individuals who either work at the site or have provided services. All four attended the Inquiry and swore the contents of their statutory declarations to be true and gave oral sworn evidence to further clarify the content.
31. The first witness to appear was Mr Shepperdson, a director of the company that installed a batch weighting system to the appellant's factory in 2001. His statutory declaration explains that a batch weighting system is an automated system that weighs and mixes various ingredients to produce concrete, before the concrete is transported to the block manufacturing machines at the site. It cannot be used remotely and requires an operative to be present to operate it.
32. Mr Shepperdson states that his company also installed data logging software at the factory in 2001. Amongst other things, the software records the time the batch is produced, and the time taken to produce it. On or around 6 September 2018, Mr Shepperdson downloaded data (described as a 'batch report') to show the dates and times that the batch weighing system was operational between 1 January 2002 to 22 December 2017. It is the evidence of Mr Shepperdson that the batch report verifies that the batch weighing system was continuously operated between the hours of 5am to 12pm (corrected to 12am) on Mondays to Saturdays throughout the specified period. A different system was installed after December 2017 hence the batch report end date.
33. Mr Shepperdson had made an earlier statutory declaration on 26 March 2019 which was considered by the previous Inspectors. Both Inspectors noted that whilst the batch report points towards the system being operational before 5am Mondays to Saturdays, the time the final batch of concrete was completed each day was up to an hour before midnight. It could not be discerned from the batch report what other machinery was used. In response to these observations, Mr Shepperdson states that the batch weighing system forms

- only one component of the overall block production system at the factory. He submits that it is not the case that the end time shown in the batch report equates to the end of the overall production.
34. In oral testimony, Mr Shepperdson confirmed that the data logging software results could not be altered subsequently. There was nothing he could think of that might affect the accuracy of the reports.
35. Also appearing before the Inquiry was Kheireddine Dziri, a director of a company supplying electrical services to the appellant. He is a qualified electrician with over 19 years' experience. He swore a statutory declaration in March 2019 that was considered by the previous Inspectors, which is now supplemented by another statutory declaration made on 19 September 2023.
36. Mr Dziri produced electricity reports obtained directly from three energy suppliers to the factory between August 2005 to September 2017. The reports were supplied in read-only format. They record electricity consumption at the site on a half-hourly basis from a single transformer providing power to the factory only.
37. Mr Dziri states that the reports confirm a significant increase in electricity consumption on the site during the hours of 4.30 and 5.30am on Mondays to Saturdays and a significant decrease between 12am and 1am. Based on the high level of electricity consumed on the site, all of the block production machinery must have been continuously operated during these times. This is because no other electrical source (lights, computers etc) would be capable of consuming the level of electricity identified. The first Inspector queried the logic of this statement which suggested that all the block production machinery was not being continuously operated, if at all, where there was no significant increase in electricity consumption.
38. The first Inspector further observed that although there appeared to be a general increase in electricity demand 4.30 and 5.30am Mondays to Saturdays, this trend was not consistently observed with numerous occasions where the data does not appear consistent with the conclusions drawn by Mr Dziri. The second Inspector also picked up on this point, adding that a drop in electricity consumption could be observed at times significantly earlier than midnight in the period between late October and late March in the years 2006 and 2008 and substantial periods during September to November 2012. These were described as non-exhaustive examples that called into question whether the machinery, and therefore the factory as a whole, had been operational at the times of night claimed.
39. Mr Dziri responded to these points in his supplementary statutory declaration and disagreed with the conclusions drawn. He restates that the records demonstrate that electricity consumption increased between 4.30 to 5.30am each day on Mondays to Saturdays with levels maintained throughout the day (except for *de minimis* interruptions) until decreased between 12am and 1am. It does not, in his view, demonstrate that the block production machinery was not being continuously operated. Mr Dziri considers it natural that there may have been occasion when electricity consumption was lower to explain why 'the trend was not consistently observed'.
40. A witness with first-hand knowledge of operations is Trevor Hovenden who has been employed by the appellant since 5 May 1993, initially as a machine

- operator and promoted to Team Leader since 1995. His responsibilities include overseeing employees at the site and operating the block making machinery.
41. In a statutory declaration of 19 September 2023, Mr Hovenden confirms that *"the Site has been operating (without interruption) between the Operating Hours"* (i.e., 5am to 12am hours Mondays to Saturdays) since the start of his employment with the appellant in May 1993 up to submission of the LDC application in April 2019. In oral evidence Mr Hovenden said that demand does fluctuate a little bit, but he has never experienced less hours than those stated.
42. Alan Eastwood is the appellant's Operations Director. He has worked at the site since operations began there in January 1991, initially as Works Manager and then General Manager before his current appointment on 4 January 2005.
43. The first Inspector had noted an apparent discrepancy between the evidence of Mr Hovenden and Mr Eastwood who gave a later date of 4 January 2005 for when the factory began operating the extended hours. The second Inspector similarly referred to the substantial discrepancy of some 12 years between the two witnesses as to when the breach of condition first began. Both deny any inconsistency or discrepancy.
44. Mr Eastwood explains in his supplemental statutory declaration of 19 September 2023 that he was simply confirming the facts since starting his role as Operations Director in January 2005, from when he has directed the times the factory is operational. Mr Eastwood stresses that he was not intending to assert that the hours of operation had only begun at that time.
45. For clarification, Mr Eastwood swears that occasionally the plant has operated from 4.30am to "slightly beyond midnight" but the core operating hours have been 5am to 12am on a continuous basis throughout his period of employment i.e., from January 1991.
46. During his oral testimony Mr Eastwood explained that inside the factory there are two block making machines and two mixers. A team leader and machine operator go in early to start up the mixers at 4.30 to 4.45am so that the machines are warmed up ready to start block making at 5am on the dot. The shift pattern starting at 5am through to midnight has consistently operated since 1991 due to 'massive demand' for their product, supplying to the building trade in London.
47. The LDC application form gives 1 January 2002 as the date the use or activity began (in breach of condition). Having spoken to the appellant's planning consultants who were responsible for preparing and submitting the form, Mr Eastwood understands the date was provided to align with the earliest date derived from the batch reports exhibited by Mr Shepperdson.
48. In his supplemental statutory declaration, Mr Eastwood emphasises that the site *"operates as a single cohesive unit in the production of blocks. No single process can be singled out from another and no single large piece of machinery can be operated in isolation."* He goes on to explain that the *"overall operation comprises bringing in raw materials, weighing and batching, mixing and then the supply of mix via conveyor to the block machines. Concrete blocks are then produced and, once cured, these blocks are cubed and stacked in our yard on the Site."* He adds that: *"The process is a cycle and must be run together."*

49. Both Mr Hovenden and Mr Eastwood swore that the factory generally shuts down for a few days over Christmas. Otherwise, from their knowledge there has been no break in the shifts operating from 5am to midnight, Monday to Saturday, in their time at the company. The machines break down occasionally, but this does not reduce working hours. Mr Eastwood recalled one occasion when the block machines were being replaced and so the company ran one machine for 3 months over 24 hours.
50. In answer to the question of whether the LDC application is for works across the whole site or part, Mr Eastwood explained that the whole site is 3.75 acres and the factory occupies just under 1 acre. It is the factory where the working hours take place between 5am and midnight Monday to Saturday on block production. The 'tanks' annotated on the application plan hold cement powder used to make cement in the block making process.
51. The Parish Council states that the use had not been ongoing for 10 years but produces no statements or evidence to that effect. The only contrary evidence is the written submission from Mr Perry Wooster who identifies himself and his mother as the closest residents to the appeal site, living at different addresses. In his affidavit sworn on 16 January 2019, Mr Wooster disputes that production has taken place during the evening and at night for over 10 years. As direct neighbours for some 40 years, he says that he would most definitely have seen and heard work activities, particularly from his garden in the summer months, and raised complaint.
52. Mr Wooster states that until approximately 18 months before his affidavit was made, production and work at the site only took place during the course of the day. He produces a joint letter sent by Messrs Wooster to the Council dated 20 July 2018 complaining of the factory operating 24 hours per day in breach of condition over "the past 8 to 12 months". This account is endorsed in an affidavit from Mr William Wooster, sworn on the same day.
53. Mr Eastwood addresses the issues raised by Messrs Wooster in his statutory declaration. Among other points, he highlights the number of businesses in the locality, all utilising lorries and vans, including a haulage and storage company.
54. A noise report is produced by Mr Eastwood from June 1997 when the appellant had commissioned a firm of acoustic consultants to investigate noise implications upon residents from a proposed expansion of its operations onto an adjoining site. The report found that the expansion would effectively move the area worked by lift truck closer to residential property with resultant increase in noise, but the noise of the block machine was unlikely to change. It concluded that even though increased noise from expansion "may be noticeable to residents.... it is unlikely that residents will find the noise any more disturbing than that of normal traffic noise." Mr Eastwood interprets the report as consistent with noise being barely perceptible beyond the perimeter of the site even when operating between the extended hours.

Assessment

55. The Council no longer opposes the appeal or the grant of a LDC. Nevertheless, it does not automatically follow that a LDC must be issued. I must still be satisfied that the evidential threshold is met taking into account any evidence to the contrary.

56. Points of inconsistency in the appellant's evidence have now been addressed through the submission of sworn statutory declarations, supplemented by sworn oral testimony.
57. A key concern of the previous Inspectors arose from the statutory declaration of Mr Eastwood 29 March 2019 where he stated that: "*Since around 4 January 2005 to date, the factory has been operating between 5:00am and 12:00am, Mondays to Saturdays, on a continuous basis.*" This appeared to conflict with the much earlier date given by Mr Hovenden whose statutory declaration described those same hours of operation taking place since his employment began on 5 May 1993. There was also inconsistency between both witness accounts and the application form which gave 1 January 2002 as the date the breach began. These matters have been satisfactorily clarified in the supplemental statutory declaration of Mr Eastwood.
58. The evidence of Messrs Eastwood and Hovenden carries significant weight having worked at the factory site since 1991 and 1993, respectively, in roles where they had knowledge of operational hours. Witness evidence does not require corroboration by independent evidence in order to be accepted (*F W Gabbitts v SSE* [1985] JPL 630). Both witnesses are adamant that the hours of operation in the manufacture of building blocks continued throughout their employment between the hours of 5am and 12am, Monday to Saturday without gaps, save for a short break each year over each Christmas period.
59. Condition 4 imposes a continuing requirement on the hours of permitted operations at the site. Where such a condition is breached, and then the offending activity is ceased and the condition is complied with once more, the breach of planning control is deemed to have ended and the 10-year clock will restart if and when the condition is breached again. However, this only applies if the interrupting compliance is significant and not *de minimis* as a matter of fact and degree. The question to be asked is whether enforcement action could have been taken against a breach of the condition during the period of compliant activity. The wording of the condition may be determinative.
60. On the facts of *Basingstoke & Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 (Admin) a substantial period of non-occupation for refurbishment did not bring a breach of condition to an end. Thus, breaks in production over Christmas holidays or during short spells of essential maintenance works would clearly not break continuity to restart the clock in this case.
61. I fully accept that there will have been fluctuations in power demand by the very nature of operations. I also find it entirely plausible that machinery will not always be operational towards the end of a shift or due to breakdowns.
62. Mr Wooster is critical of the utility figures as random numbers that could have been made up. There is no evidence that is so. Mr Eastwood swears that the reports are unable to be edited and cannot be altered or falsified. Further, there is no apparent reason why the appellant would be restricted by data protection laws from securing information on its own power usage in the way Mr Wooster suggests.
63. Having carefully examined the power supply reports, it becomes evident why the previous Inspectors raised concerns over the hours of claimed operation.

Despite Mr Dziri's insistence that the figures show a steep increase in supply at 6am and drop off between 12am to 1am, that is not always the case.

64. I was unable to secure an answer from Mr Dziri as to the parameters of electricity supply when the factory is idle. I take the consumption figures from the early hours of the morning (when the factory is said to have been dormant) to be indicative of the range of levels to be expected when not operational.
65. With some exceptions, the records demonstrate a sharp rise in electricity consumption from around 4.30am tallying with Mr Eastwood's account of the machines being warmed up ready for a 5am start. However, the consumption figures for substantial periods of September to November 2012 show drop off in supply to levels comparable with the early hours by around 7pm. There are dates where consumption remains at a higher level until midnight, but the pattern continues on and off for some weeks into 2013. As pointed out by the second Inspector, there is also a sharp drop in the consumption figures around 10pm between end October 2006 until end March 2007. This is repeated over the same period in 2007/2008.
66. On the face of it, the electric supply reports for those periods of time do not fully correspond with the testimony of Messrs Eastwood and Hovenden that operations continued to midnight throughout their employment. It is only when considered in light of all the other evidence, including further explanations, that a different picture emerges. Notably, the batch report confirms that on each of the periods identified above, the batch weighing system was operational before 5am until after 11pm except for the Christmas period. Indeed, that is the position throughout the period between 1 January 2002 to 22 December 2017.
67. Mr Eastwood explained that the block manufacturing machine is used immediately the shift begins and ends when the shift ends. The last batch is run up to around an hour before the end of the shift at which point there are 3 (40 tonne) mixes in the system. The block machine takes around an hour to use up these mixes. This explanation accounts for the batch report showing ending times before midnight.
68. The main thrust of Mr Wooster's opposition is that he would have seen and/or heard activity had the factory operated in breach of condition for over 10 years. Whilst Mr Wooster refers to machines and factory equipment not being quiet, he also mentions noise from forklifts, conveyor belts and factory workers along with lorries and vans. This description appears to refer to full operation of the site. The LDC application concerns works having taken place in breach of condition within part of the site only (i.e., the factory) rather than activities in the yard and deliveries. Bearing in mind the noise report which addressed external operations also, the weight of evidence indicates that the works within the factory would not necessarily have been apparent to residents.
69. The totality of evidence, including judgments and submissions, suffices to conclude that, on the balance of probabilities, the factory has operated for a continuous period of 10 years, without material interruption, in breach of condition between the hours of 5am and midnight, Monday to Saturday for the manufacture of building blocks.
70. Even if there were occasions when the works did not carry on over the extended hours up to the date of the application on 3 April 2019, the judgment in *Panton & Farmer v SSETR & Vale Horse DC* [1999] JPL 461 is authority that

a use may be regarded as 'existing' and lawful even if it is dormant or inactive. For this to apply, the use must have become lawful before it fell dormant, and lawful use rights must not have been lost. It seems to me that any concerns over the electric reports are in any event overcome. The supplemented and clarified evidence of Mr Hovenden is sufficiently clear and precise alone for immunity to have been demonstrated over the 10-year period prior to 2005.

71. Having operated for a requisite 10-year period in breach of condition, there is no evidence that the use which had become lawful was subsequently lost through any means.
72. For the purposes of section 171B(4), there is no enforcement notice in effect in respect of the breach and the local planning authority has not taken, or purported to take enforcement action in respect thereof. The time for taking enforcement action in respect of the failure has expired and it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force (section 191(3)).

Other Matters

73. A letter of objection from Nazeing Parish Council dated 17 October 2023 submits that following numerous complaints from residents over many years, it strongly objects to the expanding of the number and permitted hours of heavy vehicle movements. Previous objections made on 3 June 2019 are restated.
74. As set out above, the LDC application is confined to the hours of work at the factory in breach condition. It does not extend to deliveries to/from the site which remain restricted by condition 4.
75. The appeal concerns the lawfulness of the use applied for and whether immunity from enforcement action has been demonstrated. It is not a planning application where the planning merits are to be considered. Therefore, matters such as the suitability of the highway network for HGV's and 'loss of amenity' for neighbours (including noise and disturbance) are not factors which can influence my decision. Similarly, complaints over the removal of perimeter trees, pollution and use of the gravel track for additional staff car parking, are not matters before me.
76. More evidence has been provided since 2019 when the Parish Council considered the application to not be 'compelling'. The correct test of the evidence is the balance of probabilities.

Conclusion

77. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a LDC in respect of the failure to comply with any condition or limitation for which a certificate of lawful use or development is sought described as "existing hours of use of the site from 5am to 12am Monday to Saturday." was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.
78. In this eventuality, it was agreed by the advocates that the LDC should be limited to the factory and specify the use as work for the manufacture of building blocks. Such purpose not only accurately reflects the specific operations undertaken in breach of condition over extended hours, but also corresponds with the

description of development in the planning permission. It was agreed that either the red line site be reduced on the plan to the area of the factory unit (to include the tanks) or the factory otherwise be marked thereon. I prefer the latter approach as it retains the application plan as submitted to show the site in the planning permission whilst also restricting the area certified to the factory.

79. As a point of precision, it was further agreed that the certified days should be stated to exclude Bank Holidays (i.e., those which may fall on a day other than Sunday). Any use of the factory on a Sunday explicitly remains unauthorised by the unaffected part of the condition.

80. Consensus was reached that the use in breach of condition to be described in the LDC should be expressed as follows:

The use of the factory identified [on the plan] for the carrying out of work for the manufacture of building blocks between the hours of 5am and 12am Monday to Saturday (excluding Bank Holidays) contrary to condition 4 of the planning permission dated 7 December 1990 granted under Council reference EPF/361/90.

81. I have adopted this agreed approach.

K R Seward

INSPECTOR

APPEARANCES

FOR THE APPELLANTS:

Charles Banner KC

Kings' Counsel, instructed by Lignacite Ltd

He called:

Ian Shepperdson

Kheireddine Dziri

Trevor Hovenden

Alan Eastwood

FOR THE LOCAL PLANNING AUTHORITY:

Josef Cannon

Counsel, instructed by the Solicitor to the Council

DOCUMENTS submitted at the Inquiry

1. Note of appearances on behalf of the appellant
2. Appellant's opening statement
3. Core document list
4. Opening statement on behalf of the local planning authority
5. Addendum comments of Epping Forest District Council dated 16.6.23
6. Letter of objection from Nazeing Parish Council dated 17.10.23
7. Electronic copies of core documents

DOCUMENTS submitted after the close of the Inquiry

8. Email from Perry Wooster of 20.10.23
9. Affidavit of Perry Wooster of 16.1.19 with exhibits
10. Affidavit of William Wooster of 16.1.19
11. Email confirming the Council has no comments on Messrs Wooster's evidence 3.11.23
12. Further statutory declaration of Alan Eastwood declared 3.11.23

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 3 April 2019 the matter described in the First Schedule hereto, constituting a failure to comply with a condition or limitation subject to which planning permission has been granted, in respect of the land specified in the Second Schedule hereto and hatched black on the plan attached to this certificate, was lawful within the meaning of section 191(3) of the Town and Country Planning Act 1990 (as amended), for the following reason:

Planning permission ref. EPF/361/90 was granted on 7 December 1990. Condition 4 requires that work shall only be carried out on the site (edged red on the plan) between the hours of 7am and 6pm Mondays to Fridays and between 8am and 1pm on Saturdays. The evidence has demonstrated that, on the balance of probabilities, the use of the factory within the site (hatched black on the plan) has been in use for the manufacture of building blocks between the hours of 5am and 12am Monday to Saturday (excluding Bank Holidays) contrary to condition 4, for a continuous period of at least 10 years prior to the date of the application.

The time for taking enforcement action in respect of the failure has expired and it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force. The use of the factory in continuation of the same breach of condition 4 is thereby immune from enforcement action under section 171(3) of the 1990 Act and is lawful.

Signed:

KR Seward

Inspector

Date: 13 November 2023

Reference: APP/J1535/X/20/3257300

First Schedule

The use of the factory identified with black hatching on drwg no 3526/1 (attached to this decision) for the carrying out of work for the manufacture of building blocks between the hours of 5am and 12am Monday to Saturday (excluding Bank Holidays) contrary to condition 4 of the planning permission dated 7 December 1990 granted under Council reference EPF/361/90.

Second Schedule

Land at Meadgate Works, Meadgate Road, Nazeing, Waltham Abbey EN9 2PD.

IMPORTANT NOTES – SEE OVER

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 matter, constituting a failure to comply with any condition or limitation subject to which planning permission has been granted, 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 or 187A of the 1990 Act, on that date.

This certificate applies only to the extent of the matter described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any matter 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.

It should be noted that the relevant condition is not expunged. It continues in force but with revised hours of permitted operations at the factory within the site.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 13 November 2023

by **K R Seward Solicitor**

Land at: Meadgate Works, Meadgate Road, Nazeing, Waltham Abbey EN9 2PD

Reference: APP/J1535/X/20/3257300

Scale: Not to Scale

