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# Appeal Decision

Site visit made on 30 January 2024

**by J Moss BSc (Hons) DipTP MRTPI**

**an Inspector appointed by the Secretary of State**

**Decision date: 29 February 2024**

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**Appeal Ref: APP/U1105/X/23/3330560**

**Land adjacent to Main Yard, Road to Stockshop, Lodge Trading Estate,  
Devon, Broadclyst EX5 3BS**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
  - The appeal is made by Richard Holman of OPCD Ltd against the decision of East Devon District Council.
  - The application ref 23/0532/CPE is dated 28 April 2023.
  - The application was made under section 192(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 stated in the application as 'continued use of storage/distribution (class B8)'.
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## Decision

1. The appeal is dismissed.

## Applications for Costs

2. An application for costs was made by Richard Holman of OPCD Ltd against East Devon District Council. This application is the subject of a separate decision.

## Preliminary Matters

3. Originally, the appeal was to be determined by way of a public inquiry. Accordingly, a case management conference was held during which certain matters were clarified. It was confirmed that, despite the Council preparing an officer's report in respect of the LDC application, it did not determine the application.
4. Although the application was made on forms that referred to section 192(1) of The Town and Country Planning Act 1990 as amended (the 1990 Act), as referred to in the header above, the parties agreed that the LDC application sought a certificate for an existing use of the land. I have, therefore, determined the appeal under section 191(1)(a) of the 1990 Act.
5. The parties agreed that the development for which the LDC is sought would be more precisely described as a use of the land for storage and as a distribution centre falling within Class B8 of Part B, Schedule 1 of The Town and Country Planning (Use Classes) Order 1987 as amended. I have determined the appeal on this basis.
6. The appellant refers to the Council's approach to the consultation exercise carried out for the LDC application subject of this appeal and how this differs to that for the previous LDC application (Council reference 21/2740/CPE). There

is no requirement to consult on an application for an LDC. Paragraph 008 of the Planning practice guidance on Lawful development certificates (the PPG) advises that 'it may, however, be reasonable for a local planning authority to seek evidence from these sources, if there is good reason to believe they may possess relevant information about the content of a specific application'.

7. The PPG goes on to say that 'views expressed by third parties on the planning merits of the case, or on whether the applicant has any private rights to carry out the operation, use or activity in question, are irrelevant when determining the application'. Accordingly, within the representations received, only matters that are relevant to the main issue and main considerations in this case, as set out below, have been taken into account, where necessary. Whether or not the representations were made with the appropriate authority is not for me to consider within the remit of this appeal.

### **Main Issue and Main Considerations**

8. Section 191(4) of the 1990 Act indicates that if, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application was lawful at the time of the application, they shall issue a certificate to that effect; and in any other case they shall refuse the application.
9. My decision is, therefore, based on the facts of the case and judicial authority. I note reference to the allocation of the land and policies relating to it in the development plan for the area, as well as reference to the appropriateness of the development in this location. These are matters that go to the planning merits of the development, which are not relevant to my determination of the appeal. The main issue in this case is whether the Council's decision to refuse to grant a LDC was well founded.
10. The main considerations in this case are as follows:
  - Whether or not there has been a material change of use of the land to a use for which the LDC is sought; and
  - If there has been a material change of use, whether or not this use has continued substantially uninterrupted for a period of 10 years or more, beginning with the date of the breach<sup>1</sup>.
11. If the Council has no evidence itself, nor any from others, to contradict or otherwise make the appellant's version of events less than probable, there is no good reason to dismiss the appeal and refuse to grant the LDC, provided the appellant's evidence alone is sufficiently precise and unambiguous.

### **The Site and Background**

12. The appeal site lies broadly to the east of the established Lodge Trading Estate. Access to the site is from an internal road through the estate, which terminates at the appeal site. The southernmost boundary of the trading estate and the appeal site runs alongside the adjoining railway line.
13. At the time of my visit, the easternmost boundary of the site was open to land that adjoins the watercourse running close to this boundary. There was also no discernible means of enclosure along the site's northernmost boundary. The

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<sup>1</sup> Section 171B(3) of the 1990 Act.

site was, therefore, open to the larger, undeveloped field parcel to the north and north-east of the trading estate.

14. Although the land broadly to the west of the appeal site was open to it, I saw evidence of a previous enclosure along this boundary. This land is the subject of a LDC granted for 'use class B8 storage and distribution only' (Council reference 21/2740/CPE). That application sought a LDC not only for this adjoining land, but also for the appeal site. The Council have explained that the certificate was only granted for this adjoining parcel as it was satisfied that only the use of this area was lawful.

## **Reasons**

15. It is the appellant's case that the appeal site has been used for the purposes for which the LDC is sought for more than 40 years. In support of his case the appellant has provided four written statements, two of which are from the same individual. The first is a joint written statement by the appellant and David James Holman. In this they refer to the 'upper site of Lodge Trading Estate' and describe how this land was used.
16. Whilst a number of aerial photographs are attached to the statement, none of these identify the land to which the statement relates, i.e. the land referred to as 'the upper site'. In other circumstances I would assume that the statement relates to the appeal site as identified on the plan attached to the LDC application. However, the Council say that the joint statement and the other statements are similar to those submitted with the 21/2740/CPE LDC application, and which the Council relied upon to grant a certificate for the land to the west of the appeal site.
17. Indeed, John Hall refers to the land to which his statement relates as comprising 'the land referred to in planning application 21/2740CPE'. Michael Collacott does the same in his first statement. Whilst his second statement refers to the land 'outlined in planning application 23/0532/CPE', the claims made in that second statement are the same as those made in his first, which relates to both the appeal site and the land to the west. I cannot, therefore, be satisfied that the matters claimed in any of the statements relate to the appeal site alone and not to the adjoining parcel of land that is the subject of the 21/2740/CPE LDC.
18. Nevertheless, the joint statement suggests that Holmans Haulage operated from the upper site since the early 1980s to the 1990s. They describe how the land they refer to was used (parking, storage and general operations of the haulage company) and the laying of hardcore on this land. Notwithstanding the ambiguity with regard to the land used for the haulage operations, the dates given for the commencement and cessation of this use are vague, and I have little documentary evidence to substantiate what is claimed.
19. I have noted the historic plans from 1980 and 1981, referred to by the appellant, which are also included within the statement of common ground (SOCG). It is agreed that these relate to planning applications, reference 80/C1788 and 81/P1681, which were made for the erection of a vehicle workshop, for vehicle parking and for the parking of lorries. However, the SOCG says that these applications were refused. These plans and the relevant planning history do not, therefore, support the appellant's claims with regard to the haulage company's use of the appeal site in the 1980s and 1990s.

20. The joint statement goes on to describe activity from around 2003, including the use of the land by AEI Online Limited, Whitehall Construction, Dawnus Construction and LOD Solutions. It is suggested that the aerial photographs produced by the appellant demonstrate the claims made.
21. The 2002 and 2003 aerial photographs are similar, if not the same, and on these I can see a form of track referred to in the statement, which runs from the estate road and terminates in the appeal site. In these photographs I can see a building and some objects on the land closer to what would have been the easternmost boundary of the trading estate at this time. However, there is little evidence of any activity or items on the appeal site itself. The land has a similar appearance to the open field parcels to the north.
22. The same is true for the 2006 aerial photograph which appears to show the appeal site open to the wider field parcels to the north. There appears to be little connection with the appeal site and the trading estate at this time. If John Hall's and Michael Collacott's (both of Whitehall Construction) involvement in the appeal site started at this time, this photograph does not corroborate their claims with regard to the improvements they undertook. Indeed, there is only evidence of an informal farm type track on the appeal site, but no obvious sign of fencing or the provision of compounds.
23. Notwithstanding this, when compared with the 2002 and 2003 aerial photographs, I can see that in 2006 the estate road had been slightly extended further east and that this appears to provide access to a defined area adjoining the former easternmost boundary of the trading estate. This enclosed area has the appearance of a yard or compound. All of this fits with the description of works and activity described by John Hall and Michael Collacott, but is, of course, on land that is not within the appeal site.
24. Both the 2013 and 2020 aerial photographs show objects on land to the east of the enclosed area (compound) I describe above, including what appear to be storage containers and vehicles. This is, however, on the land adjoining the westernmost boundary of the appeal site, which is the land that is the subject of the 21/2740/CPE LDC. There is little evidence of any change to the appeal site itself in these photographs. Indeed, the condition of the appeal site in these photographs is consistent with my observations of the site at my site visit. That is void of any stored items or any evidence of commercial activity.
25. The most recent aerial photographs of the site, including that from July 2022, show some items on the appeal site, which appear to include three or so boats close to the western boundary. There is, however, no confirmation of what the items might be or the connection of these items with the business operations that have been referred to by the appellant. The appellant suggests that the most recent operator is LOD Solutions. Whilst no date is given for the commencement of this business' occupation of the site, he suggests that this company's use of the site is for 'car storage, container storage, stock and plant'. There is, however, no obvious sign of any such items on the appeal site in the most recent aerial photographs.
26. Having regard to the above, I am not persuaded that the aerial photographs show **any** commercial activity on the appeal site, let alone evidence of substantial commercial activity, as claimed by the appellant.

27. I note the appellant's reference to a letter from the Council dated 21 September 2010, which refers to the site being 'currently used for open storage without the benefit of planning permission'. Whilst the appellant has submitted a plan showing proposed development on the appeal site with this letter, I have no means of being satisfied that the land referred to in this letter is only that subject of this appeal.
28. Indeed, I have noted above the extension of activity into land to the east of the trading estate between the 2002/2003 and the later 2006 and 2013 aerial photographs; all of which is activity on land that is outside of the appeal site. It is reasonable to conclude that the comments made in this letter relate to this activity, rather than relating to any activity on the appeal site alone. I say this because there is no suggestion that this activity was lawful or permitted at the time of the Council's letter and the land shown on the proposed plan includes the land on which this activity was taking place.
29. The AEI Online invoices from May 2010 provide no assistance to the appellant's case. Other than stating the names of companies referred to by the appellant, there is nothing within these documents to indicate that they relate to the appeal site.
30. Having regard to the above, I conclude that the appellant has not discharged the burden of proof that is upon him. His evidence relating to the use of the appeal site is imprecise and ambiguous. If the appellant's claims are with regard to the use of the appeal site alone, and not to any adjoining land, they are contradicted by the aerial photographs for the reasons given. Accordingly, I conclude that, on the balance of probability, there has not been a material change of use of the appeal site to a use for storage and as a distribution centre falling within Class B8 of Part B, Schedule 1 of The Town and Country Planning (Use Classes) Order 1987 as amended. This use of the appeal site was not, therefore, lawful at the time the LDC application was submitted.
31. The appellant has referred to matters relating to the loss of lawful use rights and case law relevant to this. In particular, he refers to the matter of abandonment. He is right, and the caselaw confirms, that where a breach of planning control relating to a use of land or a building has become immune from enforcement action and is found to be lawful, the lawfulness of the use (i.e. the lawful use right) may not be lost as a consequence of it not having been exercised at the date an LDC application for it is made.
32. It is not, however, necessary for me to consider this matter in this case as I have concluded that, on the balance of probability, the use of the land for storage and as a distribution centre has not occurred in the first place, let alone continued substantially uninterrupted for a period of 10 years or more prior to the LDC application having been made. As I have not found the use to be lawful, it has not gained lawful use rights where it might be necessary for me to consider the matters referred to by the appellant, including abandonment.
33. I note the appellant's reference to an appeal decision for another site<sup>2</sup>. In particular he points to the standard of proof set out in paragraph 2 of the decision. He refers to guidance and certain legal cases that also relate to the relevant standard of proof in this case. My approach to this case is consistent

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<sup>2</sup> Appeal reference APP/C3810/X/15/3035706.

with that of the Inspector in that decision and with the guidance and cases that have been drawn to my attention.

### **Conclusion**

34. For the reasons given above I conclude that the Council's deemed refusal to grant an LDC in respect of the continued use for storage/distribution (class B8) was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

*J Moss*

INSPECTOR