



Appeal Decision

Site visit made on 24 June 2025

by **D Boffin BSc (Hons), DipTP, MRTPI, DipBldg Cons (RICS), IHBC**

an Inspector appointed by the Secretary of State

Decision date: 12th August 2025

Appeal Ref: APP/T3725/X/24/3341184

Land fronting Leicester Lane, Cubbington, Leamington Spa, Warwickshire CV32 6QZ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Trustees of the Cubbington Freeholders Charity against the decision of Warwick District Council.
- The application ref W/23/1177, dated 7 August 2023, was refused by a notice dated 6 November 2023.
- The application was made under section 191(1)(a) of the 1990 Act.
- The existing use for which a LCD is sought is the open storage of sand, soils, road planings, concrete kerbing and paving (Class B8).

Decision

1. The appeal is allowed and attached to this decision is a LDC describing the extent of the existing use which is found to be lawful.

Preliminary Matters

2. The description of the existing use for which the LDC is sought is taken from the information contained within the covering letter that accompanied the LDC application. This is because the section of the application form, for the LDC that relates to the description of the existing use, cites that covering letter. Furthermore, that covering letter states that the Statutory Declaration (the SD) which underpins the LDC application describes the use of the land by Warwickshire County Council (WCC). The SD at paragraph 6 states that *'throughout their period of occupation, WCC has used the land for the open storage of sand, soils, road planings, concrete kerbing and paving'*. The application form indicates that the relevant Use Class under the Town and Country Planning (Use Classes) Order 1987 (UCO) is Class B8 – storage or distribution.
3. The appeal property comprises an approximately 1.6 hectare area of land that fronts onto Leicester Lane. There is mature landscaping adjacent to the boundaries of the site and the site is accessed through metal gates. That access is currently blocked to vehicular traffic by concrete blocks that have been placed in front of the metal gates. The site did not appear to be actively used on the day of my site visit even though numerous items relating to highway construction/maintenance were within the site.

Main Issue

4. The main issue is whether the Council's decision to refuse to grant an LDC is well-founded.

Reasons

5. In order for an LDC to be granted under section 191 of the 1990 Act, the burden of proof is with the appellant and the appropriate test of the evidence is the balance of probabilities. The onus is firmly on the appellant to show that the use of the appeal property for the open storage of sand, soils, road planings, concrete kerbing and paving at the date the LDC application was made, 7 August 2023, was lawful. The appellant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or 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, provided their evidence alone is sufficiently precise and unambiguous.
6. Section 191(2) of the 1990 Act states that '*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.*' In this case there is no evidence before me to indicate that there were any requirements of an enforcement notice in force at the date of the LDC application.
7. The appellant's case is that the appeal property was leased by WCC from 1966 until 2023. They also state that WCC used the site for open storage of materials relating to highway maintenance/construction for all of that time. The Council considers that there is no doubt that the site has previously been used for low level open storage by WCC Highways but there is a degree of uncertainty as to when this use ended. It has also stated that the appellant has not provided any evidence to support the case that the use of the site for open storage has not been abandoned.
8. Section 171B(3) of the 1990 Act states that '*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*'. However, it is important to bear in mind that this time limit became operative from 27 July 1992 and was not retrospective. In this case, the evidence before me indicates that WCC continually leased the appeal site from the appellants from 17 August 1966 until the summer of 2023 through a series of leases and by continuing to pay rent until that time.
9. A SD signed by several trustees of the appellant charity states that the charity has been the freeholder of the appeal site since 23 April 1949 and that the land has been occupied by WCC highway authority since 1966. It goes on to state that '*throughout their period of occupation WCC has used the land for the open storage of sand, soils, road planings, concrete kerbing and paving. The extent of the area of land where open storage has taken place continuously throughout a 10 year period preceding the date of this declaration..*' Attached to the SD are copies of the various leases, a printout relating to business rates applicable from 1 April 2023, an aerial photograph and a plan marked with the area of the appeal site.

10. The evidence within the SD is precise and unambiguous in respect of who has occupied the appeal site from 1966 and what that occupier used the land for. I acknowledge that it then refers to a 10-year period preceding the date of the SD. Nonetheless, the wording of section 171B(3) of the 1990 Act makes it clear no enforcement action may be taken after the end of the period of ten years **beginning with the date of the breach** (my emphasis). As that time limit only became operational on 27 July 1992 the earliest applicable date to that time limit is 27 July 1982.
11. The business rate printout indicates that the rating assessment of the land is for storage and the aerial photographs from Google Earth show that in 1999, 2006, 2008, 2010, 2012, 2015, 2016 and 2018 materials are stored in mounds, vehicles are visible in the 2006 photograph and several unidentifiable items are on various parts of the site. Therefore, the use for the open storage of sand, soils, road planings, concrete kerbing and paving appears to be corroborated by those aerial photographs. Furthermore, there is no dispute that WCC was occupying the site and using it for open storage of sand, soils, road planings, concrete kerbing and paving from before 27 July 1982 and continued using it for that purpose until sometime in 2020/2021.
12. Based on the evidence before me and on the balance of probabilities, it is therefore more likely than not that, the use for open storage of sand, soils, road planings, concrete kerbing and paving had been operating continuously, without significant interruption, for more than 10 years up until sometime in 2020/2021.
13. I acknowledge that it is unclear whether the site is in active use for open storage in the aerial photographs dated 2020, 2021 and 2022. As stated above, the site did not appear to be actively used on the day of my site visit even though numerous items relating to highway construction/maintenance were within the site. Moreover, the last signed and completed lease document indicates that the lease expired on 24 March 2020. Yet the appellant's evidence also indicates that *'following the expiry of the Warwickshire County Council lease, they continued to holdover under the 1954 Landlord and Tenant Act paying rent, until such time as they terminated their tenancy in the summer of 2023. The payment of the rent by the County Council kept in place their tenancy, prohibiting the freeholders entering upon the site.'* Additionally, that evidence also states that the site was marketed widely.
14. Caselaw has found that a use that was merely dormant or inactive could still be 'existing' so long as it had already become lawful and had not been extinguished. That caselaw also makes it clear that if lawful use rights have been established, they can only be lost by operation of law, in one of three possible ways. These are by abandonment, by the formation of a new planning unit and by way of a material change of use. There is no evidence before me to indicate that a new planning unit has been formed or that a material change of use has occurred since the active use by WCC ceased.
15. Abandonment is a legal concept used by the Courts to describe the circumstances in which rights to resume a use which has been lawfully carried on in the past may be lost because of the cessation of that use. The entrance gates to the site have been locked and concrete blocks placed between the road and them to prevent unauthorised access to the site. Given the nature of the land, it is unsurprising that parts of it have become relatively overgrown. However, the gates are easily

unlocked and there is no evidence to indicate that the concrete blocks would be difficult to remove if the appropriate machinery was utilised. As such, I have no doubt that the physical condition of the appeal site was reasonable, at the date of the LDC application, in these circumstances. As stated above there does not appear to have been an active use of the site by WCC since sometime in 2020/2021 and there is no dispute that there has not been an intervening use. Yet that period of inactive use of the site, prior to the LDC application, is relatively short. In addition, there is no evidence to make less than credible the appellant's evidence that WCC continued paying rent until it formally terminated its lease and that the site has been marketed widely. As a result, there is little to indicate that WCC or the appellant did not intend to resume the active use of the land in question.

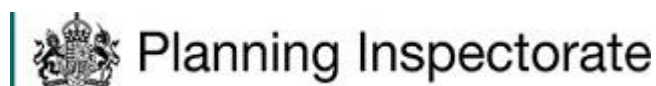
16. For all the above reasons, I conclude that a reasonable person taking an objective view and having knowledge of all the facts and circumstances would consider that the use for open storage of sand, soils, road planings, concrete kerbing and paving had not been abandoned. In drawing all the relevant factors together, I find that while that use was inactive at the date of the LDC application, on the balance of probability, it had not been extinguished by abandonment. Furthermore, it is more likely than not that, that use began prior to 27 July 1982 and continued without significant interruption for a period of more than 10 years and consequently the time for enforcement action has expired.

Conclusion

17. For the reasons given above, I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development for use for open storage of sand, soils, road planings, concrete kerbing and paving is not well-founded and that the appeal should succeed. I will exercise accordingly the powers transferred to me in section 195(2) of the 1990 Act.

D Boffin

INSPECTOR



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 10 August 2023 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged and hatched in red 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:

A reasonable person taking an objective view and having knowledge of all the facts and circumstances would consider that the use for open storage of sand, soils, road planings, concrete kerbing and paving had not been abandoned. While that use was inactive at the date of the LDC application, on the balance of probability, it had not been extinguished by abandonment. Furthermore, it is more likely than not that, that use began prior to 27 July 1982 and continued without significant interruption for a period of more than 10 years and consequently the time for enforcement action has expired.

Signed

D Boffin

Inspector

Date: 12th August 2025

Reference: APP/T3725/X/24/3341184

First Schedule

The open storage of sand, soils, road planings, concrete kerbing and paving (Class B8).

Second Schedule

Land at Land fronting Leicester Lane, Leamington Spa CV32 6QZ

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 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.

Plan

This is the plan referred to in the Lawful Development Certificate dated: 12th August 2025

by D Boffin

Land at: Land fronting Leicester Lane, Leamington Spa CV32 6QZ

Reference: APP/T3725/X/24/3341184

Scale: Not to Scale

