

**RE: LAND OPPOSITE TAMELLA, THE BRIDLEWAY, BOTLEY**

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**ADVICE**

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**Introduction**

1. My advice is sought in relation to an application for a certificate of lawful use or development (“CLEUD”) for use of land at Beech Ridge (opposite the dwelling known as ‘Tamella’), The Bridleway, Brook Lane, Southampton SO30 2ER (“the Site”) for the storage of building materials and associated vehicle parking.
2. The application is made on the basis that the use is an existing use, which has continued for more than 10 years and so is now immune from enforcement action and therefore lawful.
3. A previous application for a CLEUD (ref LDC/23/94813) was refused by Eastleigh Borough Council (“EBC”) on 6<sup>th</sup> June 2023. I have been provided with EBC’s reasons for dismissing this application, including the summary of consultee responses and EBC’s assessment of this evidence in tabular form.
4. Having reviewed the evidence, the Officer recommended on the previous occasion that the application be refused for the following reasons:  
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  - The Council is not satisfied that, based on the information submitted with this application, the use is lawful due to insufficient evidence that the land has been used for storage and as a yard for a period in excess of 10 years.
  - Based on the evidence available, the alleged use of the land is likely to have commenced no earlier than 2019/20020 and has intensified significantly since commencing.”
5. I am therefore asked to advise whether the evidence in support of the revised application is sufficient to overcome EBC’s previous concerns and to “satisfy” the Council as to the lawfulness of the use for the purposes of s191(4) Town and Country Planning Act 1990.

## **Relevant Law**

### **CLEUDs: evidential requirements**

6. Section 191 provides, insofar as relevant:

“(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.

.....

(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.....

(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. In *F. W. Gabbittas v Secretary of State and Newham London Borough Council* [1985] J.P.L. 630, the Court considered the scope of the requirement to “satisfy” the local authority of the lawfulness of the use or development under s191(4). It held that an applicant’s own evidence does not have to be corroborated by independent evidence in order to be accepted. Further, if the local planning authority have no evidence of their own or from third parties to contradict or otherwise dispute the applicant’s version of events, rendering them less than probable, then 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 the certificate on the balance of probabilities.
8. These principles are now restated in the PPG.
9. The procedure and evidential requirements for making a CLEUD application were also recently considered by Holgate J in *R (Ocado Retail Limited) v London Borough of Islington* [2021] EWHC 1509 (Admin) at paras 61-73.

#### Intensification of use

10. It is extremely rare for a material change of use to arise purely as a result of an intensification of use. Indeed, in *Hertfordshire County Council v The Secretary of State for Communities and Local Government* [2012] EWHC 277 (Admin), Ouseley J undertook a detailed analysis of the authorities concerning intensification and was unable to identify any authority, where a material change of use had occurred through intensification alone:

“43... Although authorities, in the Court of Appeal for example in *Fidler v the First Secretary of State* [2004] EWCA Civ 1295 at paragraph 28, and earlier in, for example, *Lilo Blum v the Secretary of State for the Environment* [1987] JPL2 78 per Simon Brown J, treat the principle of a material change of use by intensification as well established, the fact remains that no decided case has been shown to me in which a material change of use by intensification has been found to have occurred.

44. In *Brooks and Burton Limited v the Secretary of State for the Environment* [1977] 1 WLR 1294, Megaw LJ pointed out on page 1306E-J that experienced planning counsel had found no reported case in which an intensification in existing use had been found to be a material change of use. That remained the position in front of me. Although earlier cases, mentioned in the authorities cited above say that the existence of a material change in use by intensification is well recognised, they do no more themselves than recognise that material change of use by intensification may exist. They have never actually found one.

45. This reflects what Sullivan J said in *R v Thanet District Council v Kent International Airport Plc* [2001] P&CR 2 at paragraph 54:

“It is easy to state the principle that intensification may be of such a degree or on such a scale as to make a material change in the character of a use, it is far more difficult to apply it in practice. There are very few cases of ‘mere intensification’. Usually the increase in activity will have led to some other change: from hobby to business, from part to full-time employment, or an increase in one use at the expense of other uses in a previously mixed use.” [emphasis added]

11. Ouseley J also emphasised that a change in the degree of impact arising from a use, whether positive or negative, could not lawfully constitute a material change of use. In order for there to be a change of use through intensification or otherwise, there must be a material change in the character of the use made of the land:

“40. Although the concept of a material change of use can be expressed clearly enough as a concept, it is elusive in practice, perhaps even illusory. But one point is clear from all the authorities, and the Inspector expresses it correctly in paragraph 68 of her decision, as I set out above: the change relied on has to result in a material change of the use of the land, and it can only do that by bringing about a definable change in the character of the use made of the land.

41. I have no difficulty in seeing that significant environmental effects, experienced on or off-site, may support the contention that a material change of use of land by intensification has occurred. There are plenty of authorities to that effect. But I do not see how effects, whether on or off-site, can themselves constitute a material change in the use of the land. The concept focuses on the use made of a particular piece of land. I do not see how an increase in lorries, for example, arriving in the road at unsocial hours, or creating problems at a junction a mile away, or an increase in noise or dust experienced off-site from activities on-site, is capable of itself or themselves, whatever the degree of increase, of constituting a material change of use on a particular site. It may be very relevant to the argument that there has been a material change in the character and use of land. For example, a specialist gas bottle disposal facility might be treated as a materially different use from a general scrapyards because of its noise impacts. But of itself, an increase in noise impact, however severe, cannot be a material change in the use of the land.

42. The relevance of impacts comes in evidencing a material change of use of the land, a definable change in its character, but one which is defined by a material change in use, not by a change however severe or minimal, in the effects of a use. [emphasis added]”

12. The judgment of Ouseley J was upheld in the Court of Appeal: see *Hertfordshire County Council v The Secretary of State for Communities and Local Government* [2012] EWCA Civ 1473:

“15. The Inspector's detailed assessment, under the headings stated above, followed that approach. She accepted, for example, that “the increase in early morning traffic has seriously impacted upon the living conditions of residents in Cadwell Lane” (paragraph 45). As a planning judgment, the Inspector was in my view entitled to reach the conclusion at paragraph 70<sup>1</sup>, already cited, of her determination. I agree with the respondents' submissions, as did the judge. Ouseley J stated, at paragraph 33:

“The Inspector looked at those impacts which she concluded were attributable to the increase in throughput, but reached her unassailable and well-reasoned conclusion on that point adverse to the County Council.”

The increase in tonnage was very substantial but, the test being as to whether the character of the use had changed, the Inspector was entitled to conclude that it had not.”

### **The evidence**

13. In addition to the applicant's own statutory declaration, the evidence that I have seen falls into three categories:

- a. Statements from directors / senior managers at developer, housebuilder and construction companies, testifying first hand to the use of the yard for the storage of building materials for at least ten years;
- b. Statements from residents living mainly on Brook Lane / the Bridleway and Marls Road (which joins the Bridleway to the west and north), who confirm that they have witnessed the use of the Site for the storage of building materials, as well as associated lorry movements, over varying periods from 2007 onwards.

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<sup>1</sup> “Taking all the various effects as a whole, they cannot be said, as a matter of fact and degree, to have produced a materially different situation in planning terms than previously existed.”

- c. A large number of client receipts for building materials, ranging in date from 2011 to 2024.

14. As to the business statements:

- a. Mr Doswell of Doswell Projects states that he has collected tiles from the Site on a once / twice monthly basis “since at least 2009 to the present day”, using a 7.5t man drop size truck.
- b. Mr Southcott of Southcott Homes states that he has collected materials from the Site on average two or three times a month for over 10 years and confirms that there have always been building materials stored all over the Site and beneath the trees, as well as one to four vans/ trucks parked on the Site at any time.
- c. Mr Wickens of Wickborne Homes Limited confirms that he has delivered building materials to and from the site since at least 2013, at least once a fortnight.
- d. Mr Dorrington of Dorrington Homes states that he has collected roof tiles and building materials from the Site approximately six times per year for “at least the past 10 years”, accessing the Site originally over the bridge and then from the frontage access and that the removal of the trees has improved access to the rear of the yard.
- e. Mr Goodenough of Elliott Brothers Ltd (business development director) states that his delivery drivers have delivered building materials to the Site since at least 2013 approximately once a week.
- f. Mr Rogers, Director of MWR Groundworks Ltd confirms that he has delivered building materials to the Site several times a month since at least 2007 and that he has witnessed stacks of building materials stored across the whole site during those deliveries.
- g. Mr Gould of Firgrove Group Ltd states that he has delivered roof tiles, bricks and blocks and aggregates to the Site for many years and that the reduction in the tree line has improved the overall accessibility of the Site.
- h. Mr Clay states that he has delivered roofing materials to the Site on behalf of Burton Roofing Merchants Ltd for the past five years, and before that on behalf of SIG Roofing Supplies since 2010. I note that this evidence was treated as “supporting” evidence by EBC on the previous application.

15. Apart from (g), above, all of the statements from users therefore confirm that they have used / witnessed use of the Site for the storage of building materials for the requisite period. Although (g) does not specify the length of user (save in general terms “for many years”), there is a reference in paragraph 7 to the varying transport vehicle options “over the past 10-12 years”, which suggests that this is the period being referred to. Moreover, there is a receipt in the bundle of documentation made out to Mr Gould of Firgrove dated 14<sup>th</sup> March 2013 (for 6x pallets Double Roman Pan Tiles).
16. I therefore consider that (g) also demonstrates use of the Site as a building materials storage yard for the requisite ten year period.
17. All of these witnesses state that the number of collections/ deliveries and volume of materials stored on the Site has not changed over this period. They confirm that the storage of items and delivery to /collection from the Site predates the removal of the trees but that this has made manoeuvrability easier. They also endorse Mr Skinner’s evidence concerning the use of the historic bridge access.
18. This evidence is further corroborated by the signed letter from Mr Collins (previously of Lockhams Construction Ltd), which confirms that two loads of crushed concrete were delivered to the Site in 2010. Mr Skinner’s statement explains that this material was used to create the bridge access in 2011, which was then replaced by the front access in December 2019.
19. These statements are also all accompanied by a plan outlining the Site in red. There is no ambiguity, therefore, as to the area of land which is said to have been used for storage purposes for the requisite period.
20. As to the residents’ statements:
- a. Mr and Mrs Skinner (Marls Road) state that they have passed the site on a daily basis since 1988 and that the land has been continually used for the storage of building materials and 3 to 4 associated vehicles since 2007 and for agricultural storage before then. They confirm that the building materials storage use predates the removal of the trees.

- b. Mr Vaughan (Marls Road) states that the Site has been used for storage of building materials and associated vehicles (and before that agricultural storage) since 1998. I note that his previous statement was held by EBC to be supportive of the previous application.
- c. Mr Sayers (the Bridleway) states that he and his wife have walked their dogs for the past 12 years past the Site (three times a week) and that the Site has been used throughout this time for the storage of building materials beneath the trees.
- d. Ms Parnell (Hedge End) has a livery business and keeps her horses in the fields immediately adjacent to the Site and has done so for the past 14 years, driving past the Site two or three times per day. She confirms that the Site has been used for storage of building materials throughout this time and that she has witnessed many different types of vehicles, delivering and collecting building materials “many times each week” from the Site.
- e. Mr Beirne (Marls Road) states that he has lived in the area for 34 years and also uses the bridleway daily, including to walk his children to and from school. He confirms that for at least the last ten years the Site has been used for the storage of building materials and that vehicles previously used the side access.
- f. Mr Rafi (Marls Road) states that he has walked his dog along the bridleway daily and has run past the Site at least 3 times a week for the past 6 years. He confirms that the use of the Site for storage of building materials pre-dates the removal of the trees and that the level of usage has not changed since he has lived on Marls Road.
- g. Mr and Mrs Roy (Brook Lane) state that they have lived on Brook Lane for the past 7 years (and in the vicinity of the Site for 40 years) and that they regularly (nearly daily) walk the route past the Site. They confirm that the Site has been used for storage of building materials beneath the trees since they have lived on Brook Lane and that they have witnessed deliveries and collections of building materials from the Site multiple times per week during this period.
- h. Mr Stacey (Marls Road) states that he has lived on Marl Road for the past 6 years and that he walks/ drives along the bridleway and past the Site

regularly (at least 5 times a week). He also states that he has witnessed daily deliveries and collections of building materials by lorries and that this use pre-dates the removal of the trees.

21. As it is not entirely clear whether Mr and Mrs Roy ((g), above) are referring only to the seven year period when they have lived on Brook Lane itself, or the forty years when they have lived in the vicinity of the Site, I have assumed against the applicant that none of (f)-(h), above, confirm the use for the requisite ten year period. However, these witnesses all confirm that the use of the Site for storage of building materials predates the removal of the trees and so are consistent with the statements of users and residents, who are able to testify to use over the full period. The other statements by residents confirm the use of the Site for the storage of building materials for the requisite 10 year period.
22. I also note that there is some similarity of wording in these statements. I understand that an outline / template statement was provided to residents and business users for convenience. However, this is not unusual where third parties have been asked to provide evidence in support of or opposing a planning application. I also note that all of the statements have been personalised and adapted as necessary. I do not therefore consider that this diminishes the weight to be given to any of these statements.
23. The third category of evidence is a sizeable sample of receipts for building materials. I have reviewed these receipts and I note that they cover the whole period from 2011 to January 2024 and that many of these receipts are made out to the businesses/ individuals who have provided statements. Pre-2015 the receipts are provided by SDS Roofing Services, whereas from 2015 onwards the receipts are from SDS Roofing Services Limited, and this is also consistent with the applicant's own evidence (see paragraph 3 of Mr Skinner's statement). The earlier receipts include the address "Beech Ridge, off Brook Lane, Botley SO30 2EY", whereas the later receipts refer interchangeably to "Brook Lane, Botley" and "Tamella, Brook Lane, Botley". Taken together with the business statements, in my opinion it is clear that these receipts relate to building materials, which have

been delivered to / collected from the Site as described in the supporting statements.

24. I understand that this is only a sample of receipts provided over the years and that the applicant has many more of the same. However, this sample is sufficient to demonstrate, by way of contemporaneous evidence, the continuous use of the Site as a builders' / storage yard for the requisite ten-year period.

25. Against this wealth of consistent evidence, the evidence from objecting neighbours on the previous occasion can be summarised as follows:

- a. Springtime Cottage lives in the area (Broad Oak) and states that until 2-3 years ago the area was "untended woodland". Acknowledges that "it may well be the case that some use was made of the edge of the unmade track for parking of vehicles etc" but believes that the area has expanded in the last 2-3 years since the tree clearance works. Attaches Google Earth Pro images showing the tree coverage and the clearance of the area between May 2020 and 2022.
- b. 13 Salwey Road No evidence concerning usage. The planning merits of the application are not relevant.
- c. 23 Blossom Close states that vehicles have been parked on the left-hand side of the bridleway "opposite Garth Skinner's yard" but that "the wild land opposite Tamella has remained wild land until recently" and that clearance works and "storage of pallets, portaloos etc. all began much more recently than ten years."
- d. 16 Blossom Close states that they moved to the area in 2017 and that at that time the area in question was a wooded area with no signs of any development. Confirms that the trees were cleared around 2019/ 2020. States that there have been morning fires at the yard since these clearance works and suggests that these may be trade waste.
- e. Broad oak resident has lived "in Broad oak" for 25 years but has only noticed materials being stacked and buildings going up around the site, as well as increased noise, in the past three years. No address given.

## **Analysis**

26. As the well-known principles established in *Gabbitas* make clear, there is no requirement to obtain corroborating evidence to support an applicant's own evidence on a CLEUD application. This evidence should be accepted, absent any genuinely contradictory or conflicting evidence, which renders it less than probable.
27. In this case, local residents have challenged the validity of the applicant's evidence concerning use of the Site for the storage of building materials and associated vehicles for the whole of the ten-year period. Consequently, and following the refusal of the previous application, the applicant has obtained numerous additional statements from residents and businesses to confirm the duration and extent of the use.
28. The applicant's evidence that the Site has been used for more than ten years as a storage/ builder's yard is endorsed and confirmed by the statements summarised above, from both businesses and local residents.
29. I have considered whether this evidence is capable of being refuted or outweighed by the evidence submitted by objectors against the previous application. However, on closer analysis there is no real inconsistency between the objectors' letters and the statements submitted on behalf of the applicant. The objectors all state that the Site was only cleared in 2019/ 2020 and that prior to this tree clearance the Site was "woodland". However, there is no dispute on the evidence that tree clearance works took place around this time and this is confirmed by Mr Skinner and the other professional and local witnesses.
30. Looking at the evidence in the round, it is clear that the storage use for building materials pre-dated the clearance of the trees. However, this use has become more apparent – and visible - now that the trees have been removed. This increased visibility would also account for any suggestion that the use has increased since

that time, contrary to the clear and consistent evidence of users of the Site that the volume of materials stored at the Site and frequency of deliveries has not changed.

31. In any event, mere intensification would not be sufficient to give rise to a material change of use, even if this intensification resulted in adverse offsite impacts, absent evidence that the character of the use has changed: see *Hertfordshire CC*, above. I have seen no evidence of any change in the character of the use here, nor indeed any evidence of increased off site impacts since the trees were cleared.
32. I also note that several of the objectors accept that part of the Site has been used to park vehicles for many years. This actually supports the applicant's case that the Site has been used for parking of a limited number of vehicles associated with the storage use.
33. I also consider that both the volume and the independent quality of the evidence in support of the application clearly outweighs the evidence from objectors. Whereas the objectors have reasons for wanting to see the application dismissed, since they object to the use of the Site for this purpose, the statements in support of the application (many of which are sworn statutory declarations) are made by senior Directors and Managers of local building and development companies, and by residents who have confirmed that they are not personally affected either by the use of the yard itself or by any associated vehicle movements. There is no reason that I am aware of to question the accuracy of this evidence, and so no reason to give it anything less than full weight. It is consistent with and corroborates the applicant's own evidence as set out in his statutory declaration. The extent of independent corroboratory evidence goes beyond the evidential requirements for obtaining a CLEUD.

## **Conclusion**

34. In my opinion, the volume and consistency of the evidence submitted in support of the application undoubtedly satisfies the requirement to demonstrate, on the balance of probabilities, that the use has continued for a period of more than 10 years. In light of the wealth of consistent evidence that the storage use pre-dated the removal of the trees, any apparent inconsistency in the evidence has also been

resolved. Having reviewed this evidence, I can see no justification for EBC refusing to grant a certificate on this occasion.

35. Please do not hesitate to contact me if I can be of any further assistance or if any questions arise in light of this advice.

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19 February 2023