

**4/01865/17/LDE - LAND USED FOR STORAGE AND ANCILLARY PURPOSES (B8).  
HS SCAFFOLDING LTD, THREE CHERRY TREES LANE, HEMEL HEMPSTEAD, HP2 7HN.  
APPLICANT: DACORUM BOROUGH COUNCIL - MS A LIVINGSTONE.**

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[Case Officer - Amy Harman]

## **Summary**

It is recommended the CLEUD is granted for use of the site for Storage and ancillary purposes (B8).

## **Background**

A Certificate of Lawful Existing Use or Development (CLEUD) is a legal document (not a planning permission) issued by the Local Planning Authority that is generally used to regularise unauthorised development and prevent enforcement action being taken by that Authority against any breach of planning policy or conditions.

The certificate establishes that an existing use, operation or activity named in it is lawful and as such cannot be enforced against.

In many situations, such as selling or mortgaging a property, a CLEUD can be vital to provide assurance to a prospective owner or security for a lender, that no enforcement action can be taken by the Local Planning Authority.

There are minimum time periods for eligibility depending on the type of development. The breach of planning must be continuous and current. An application for a CLEUD must be accompanied by evidence to show the following time limits have been exceeded:

- 4 years for operational development (including the erection of a new building);
- 4 years for a material change of use of a building, or part of a building, to use as a single dwelling-house; and
- 10 years for all other development, such as a change of use or breach of a planning condition.

## Site and surroundings

This site forms approximately 1,200 square metres of open land located on the north-eastern edge of Hemel Hempstead.

The site is surrounded on its eastern and southern boundary by existing woodland. The site's northern boundary abuts the wooded Nickey Line footpath and cycleway. The Nickey Line separates the site from Hunters Oak housing estate.

The access to the site is to the west, off of Three Cherry Tree Lanes which is accessed from Redbourn Road.

## Proposal

A Lawful Development Certificate is sought for the "*use of the land and buildings for storage purposes*".

The determination of a CLEUD does not involve an assessment of the planning merits. The onus is on the applicant to prove on the balance of probabilities that the use applied for is not capable of being enforced against.

For the purposes of this application the applicant needs to provide evidence that the storage use (B8) has taken place for at least 10 years from the date of the application (13 July 2017).

### Relevant planning history

- 4/00486/98/4 STORAGE OF LPG IN CYLINDERS IN ACCORDANCE WITH HSE REGULATIONS  
Temporary permission  
11/05/1998
- 4/00032/97/4 LIQUEFIED PETROLEUM GAS STORAGE  
Granted  
06/03/1997
- 4/01300/94/RET RETENTION OF USE FOR OPEN STORAGE OF GAS CYLINDERS  
Granted  
30/11/1994
- 4/01114/92/FUL CONTINUED USE OF LAND FOR STORAGE OF LIQUIFIED PETROLEUM GAS  
Temporary permission  
07/10/1992
- 4/00953/90/FUL USE OF LAND FOR STORAGE OF L.P GAS (RENEWAL)  
Temporary permission  
13/08/1990

### **Referral to Committee**

The application is referred to the Development Control Committee due to being called in by Cllr Wyatt-Lowe.

### **Considerations**

#### Principle Onus of Proof

The onus of proof in a Lawful Development Certificate is formally on the applicant.

The Local Planning Authority need not go to great length to show that the use specified in the application is unlawful. While Local Planning Authorities are statutorily required to maintain the planning register, this is not a complete record of the planning status of all land in their area. In many cases, the applicant is required to produce evidence based information on any present and previous activities which take place on the land. Some information, especially about the history of any unauthorised activity on the land will be within the applicant's remit.

The fact that a Certificate of Lawfulness may be refused because the onus of proof is not discharged by the applicant does not preclude the submission of a further application if better evidence is subsequently available. A refusal to issue a Certificate of Lawfulness is therefore not necessarily conclusive that something is unlawful; it may merely mean that, so far, insufficient evidence has been presented to satisfy the Local Planning Authority, on a balance

of probabilities, that the use is lawful.

The Courts have held that the relevant test of evidence on such matters is 'the balance of probability'. As this test will accordingly be applied by the Secretary of State on any appeal against their decision, a Local Planning Authority should not refuse a certificate because the applicant has failed to discharge the stricter, criminal burden of proof, namely 'beyond reasonable doubt'.

Moreover, the Court has held that the applicant's own evidence does not need to be corroborated by 'Independent' evidence to be accepted. If the Local Planning Authority have no evidence of their own, or 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 that the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate 'on the balance of probability'. The Local Planning Authority should proceed on the basis that neither the identity of the applicant (except in the extent that he or she may or may not be able personally to confirm the accuracy of any claim being made about the history of a parcel of land), nor the planning merits of the use, are relevant to the consideration of the purely legal issues which are involved in the determination an application.

#### Evidence submitted by applicant / agent

- The application form
- Business Rates dating from
  - 01 Apr 1990 - 02 May 2007 - Edwards of Hemel Hempstead Ltd
  - 3 May 2007 - 15 Oct 2008 - Flogas UK Ltd
  - 16 Oct 2008 to 31 March 2016 - DBC
  - 01 April 2016 - to current - Hs Scaffolding Ltd

(NB – 1 April 1990 is the start of the current Business Rates legislation so may have been there prior but we have no record prior to this date.

As above we have been billing for Business Rates since 1 April 1990)

- Lease dated October 2015 - HS Scaffolding Ltd
- Lease dated 22 July 1996 - Edwards of Hemel Hempstead Ltd - Term 15 years (storage of gas cylinders)
- Lease dated 21st February 1992 - Edwards of Hemel Hempstead Ltd (storage of gas cylinders)
- Lease dated 22nd February 1960 - open storage
- Nicholas Brown Group Manager (commercial Assets and Property Development) of Dacorum Borough Council statutory declaration that;

i) Edwards of Hemel Hempstead Ltd lease of the land ran from 14th December 1995 (use as storage of gas cylinders ) to 16th October 2008 (the lease was assigned to FLogas for the period between 3rd May 2007 to 16th October 2008)

ii) Anthony Moore Team Leader Building Services confirmed that Dacorum Borough Council used the site for general storage of barriers, equipment for the town centre and items required during repairs to the bridge adjacent to the Property- from October 2008 to October 2015

ii) The site was leased to HS Scaffolding Ltd from 2<sup>nd</sup> October 2015 (with the lease due to expire 1<sup>st</sup> October 2020)

- Anthony Moore (Team Leader Building Services) of Dacorum Borough Council statutory declaration that;

i) During the period of October 2008 to October 2015 the site was used for the general storage of barriers, equipment for the town centre and items required during repairs to Three Cherry Trees Land Bridge to be temporarily stored on Dacorum Borough Council's land known as land off Three Cherry Trees Lane Hemel Hempstead

### ***Aerial photos***

An analysis of aerial photographs show use of the yard area for storage covering the period 2000 to 2010. As such these photographs do not contradict or otherwise make the applicant's version of events less than probable regarding the use for B8 storage use.

### ***Planning history***

The planning history as detailed details that the last temporary permission for the site expired 31 December 1992.

### **Consideration**

It is not sufficient to show simply that the material change of use took place more than 10 years ago; it must also be shown that the use of the property for this purpose was continuous throughout that 10-year period. Any discontinuity in the unauthorised use during the claimed 10-year period will be a matter of fact and degree in each case, and could be open to dispute. As a general rule, continuous use would need to be demonstrated, and any period other than a very brief one in which the use ceased could amount to discontinuity in the use, so that later resumption of the use would be a fresh breach of planning control, with time for the purposes of the 10-year rule starting again from zero.

A ten year period for the purposes of this Certificate would cover the period October 2007 to the present date.

The evidence above would suggest that business rates have been paid on this site from a period of 1 April 1990 to current relating to storage uses.

Lease evidence has been provided to support this.

### **Analysis of 10 year use for the site**

Edwards occupied the site up until 2 May 2007 (lease and business rates to support)  
Flogas occupied the site from 3 May 2007 to 15 October 2008 (business rates to support)  
DBC occupied the site 16th October 2008 to 31 March 2016 - (business rates and statutory declaration)  
Hs Scaffolding Ltd 01 April 2016 to present day (lease and business rates)

The applicant needs to give evidence which is precise and unambiguous which can justify the grant on the 'balance of probability', to the effect that the land has been within storage use for at least the last 10 years.

Case Officers consider that the evidence accompanying the application to support the Lawful Development Certificate is sufficiently precise and unambiguous so as to conclusively demonstrate that the land has been within storage use for at least the last 10 years.

## Conclusion

The determination of a CLEUD does not involve an assessment of the planning merits. The onus is on the applicant to prove on the balance of probabilities that the use applied for is not capable of being enforced against. Section 191(2) provides the following test:

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.

On reviewing the evidence submitted officers consider that there is sufficient evidence to clearly demonstrate that the land has been in a continuous storage and ancillary use for the last 10 years. On this basis a Certificate of Lawful Development should be issued.

RECOMMENDATION – That the CLEUD is **GRANTED** for the use of the land for Storage and ancillary purposes (B8).

- 1 **The applicant has provided sufficient evidence to prove that the site (as shown within the red outline of the submitted Site Plan) has been used continuously for storage and ancillary purposes for a period of ten years preceding the date of this application. This decision is based on the evidence provided by and on behalf of the applicant. The land therefore has a lawful use as described above at Three Cherry Trees Lane.**