Appendix A

Historical Aerial photographs

Appendix A – Historical Aerial Photographs 2000 - 2022

Google Earth Image taken 01.01.2000.

Google Earth Image taken 03.07.2006

Google Earth Image taken 01.01.2010

Google Earth Image taken 27.09.2011

Google Earth Image taken 21.04.2015

Google Earth Image taken 20.04.2016

Google Earth Image taken 05.04.2018

Google Earth Image taken 29.03.2019

Google Earth Image taken 21.04.2020

Google Earth Image taken 27.04.2021

Google Earth Image taken 16.06.2021

Google Earth Image taken 28.03.2022

Appendix B

email to landowners May 2021

Appendix B – Email dated 27 May 2021

From: Johnstone Matthew
Sent: 27 May 2021 13:38
To: ASH SACHDEVA [redacted]
Subject: FW: E/21/0183 - Syston Mill - Planning Enforcement

Dear Ms Sachdeva,

Following our meeting on site, the council is trying to best understand the history of the site, and what uses have been established on the property. I will be serving a Planning Contravention Notice (PCN) which will include a list of questions about the property for you to complete. From here we will be able to provide the best advice concerning the work that has occurred, which will inform the position in terms of any further work you wish to do in the future.

I must request that no further work should be undertaken and no further changes of use or activities permitted before the history and permitted use of the land can be established and it has been approved by the council, either through an approved planning permission or through confirmation that the works are permitted development.

I would recommend using a planning agent for any works you plan to carry out, a list of these can be found on Charnwood's website, which I have provided a link to below. Any works on this site, due to its history, location and the planned scale of works should seek pre application advice.

https://www.charnwood.gov.uk/pages/accredited_planning_agents_scheme

https://www.charnwood.gov.uk/pages/pre_application_planning_advice

I will be sending over a PCN soon, this will ask questions about what activities have occurred on the site, as well as any evidence you can provide of this, what works have occurred in the past ten years on the property and other details such as ownership and interested parties.

Any roads will be covered by Leicestershire County Council, and the A46 behind your site is most likely the responsibility of Highways England. I would recommend you begin consultation with a planning agent first to work out what schemes may be viable before contacting these authorities.

I think it likely that any major scheme on the site may take quite some time, so I will be treating the regularisation or alteration of the new surfacing separately, and once the PCN has been submitted and completed I will begin talks with you on what action may be required there.

I hope this helps, please contact me if you have any further questions.

Kind regards,

Matthew Johnstone, Planning Enforcement Officer
Planning and Regeneration, Charnwood Borough Council
Mobile: 07834335381
E-mail: matthew.johnstone@charnwood.gov.uk

Visit our website http://portal.charnwood.gov.uk/MVM/Online/PL/Home.aspx where you can view the planning files and monitor the progress of planning applications using Planning Explorer.

The Planning Portal - your one-stop-shop for planning services online. ***You may now submit your Planning applications on-line at*** http://www.planningportal.gov.uk over 30% of applications are currently being submitted to Charnwood this way.

Appendix C

Planning application documents P/22/0061/2

DESIGN AND ACCESS STATEMENT

Change of Use of land to Car Sales/vehicle parking (Sui Generis) and associated works

At

Mill lane, Syston, Leicester, LE7 1NS

11th December, 2021

Omega Next Generation
4 Vale Parade SW15 3PS
www.omeganext.co.uk

Registered in England. Company n° 05662998
Tel: 02085494111
Email: enquiries@omeganext.co.uk

Table of contents

1. Introduction

This statement has been prepared in support of a planning application for the Change of Use of land to Car Sales/vehicle parking (Sui Generis) and associated works at Mill lane, Syston, Leicester, LE7 1NS on behalf of Wealth Property Ltd, the current owners of Syston Mill Lane.

The current owner of the Syston Mills Lane site, Wealth Property Ltd, (The Applicant), has the intention to submit this Certificate of Lawfulness of Existing Use or Development (CLEUD) under Section 191 of the Town and Country Planning Act 1990 (as amended) at the Syston Mills Lane site, Syston, Leicester, LE7 1NS.

The site is located within the Charnwood Borough Council, Southfield Road, Loughborough, Leicestershire, LE11 2TN.

The purpose of the application and the accompanying information is to establish the existing use of the land marked on the site plan as A, B, and C for parking cars (Sui Generis) for a period of at least more than 10 years.

The CLUED application process is to establish that the requisite time-limits referred to in Section 171B (3) of the Town and Country Planning Act 1990 are met and therefore that the use of the land for car parking (Sui Generis) has been for more than 10 years and as such lawful, and therefore not requiring planning permission.

The application is supported by the following documents and drawings:

- Location Plan
- Site Plan
- Photographs of the site.
- Declaration statements from David Knapp.
- Declaration statement from Stuart Chander.
- Declaration statement from Surbeer.
- Previous planning history.

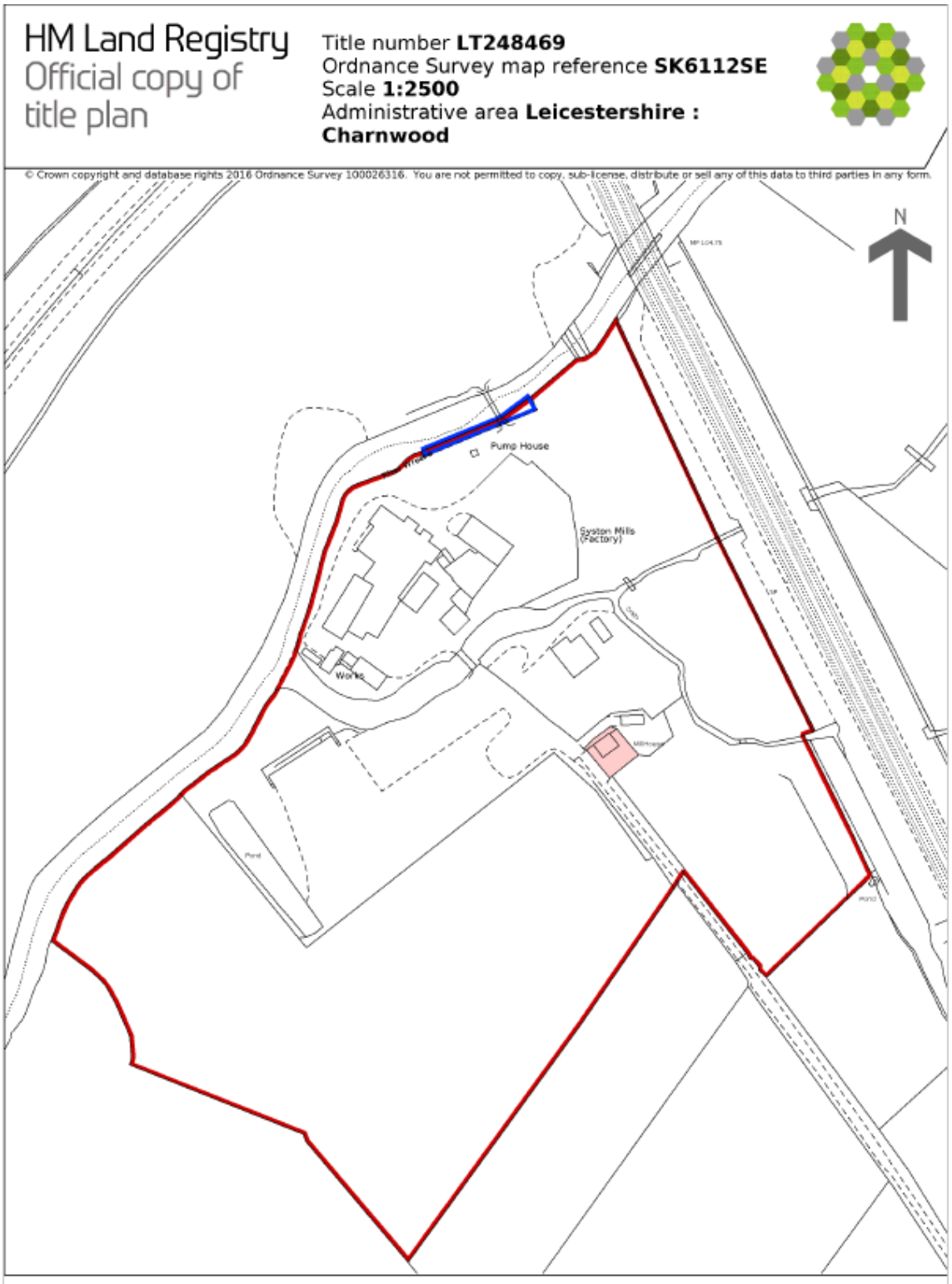
2. The application site and Surroundings

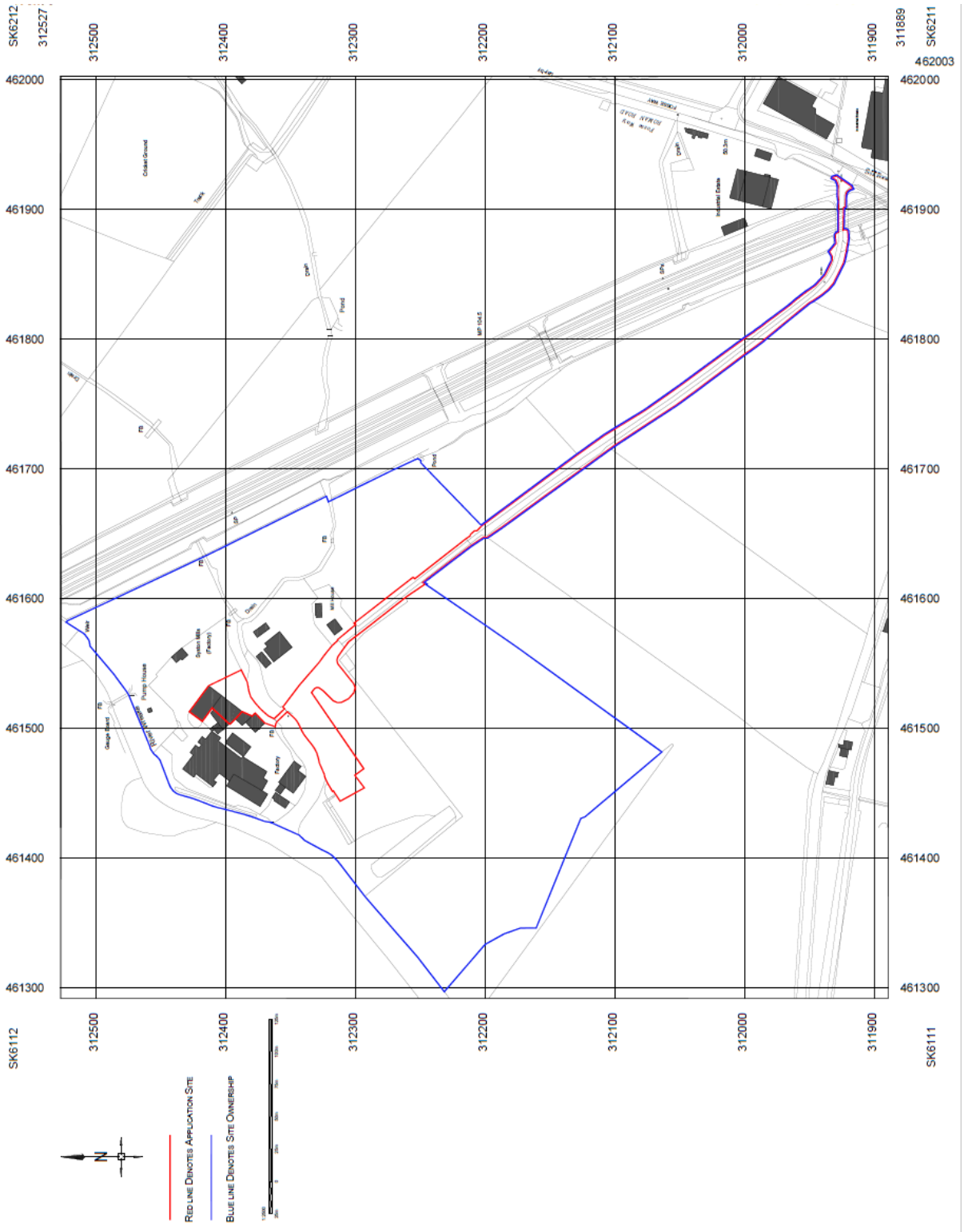
The application sites are identified on the submitted site plan as Plot A, B, C, and D and they form part of a range of old industrial buildings which have now been converted into various business units.

The units are rented by various businesses who are now tenants there. The whole site is referred to as the “Syston Mills site” with access from Mills Lane.

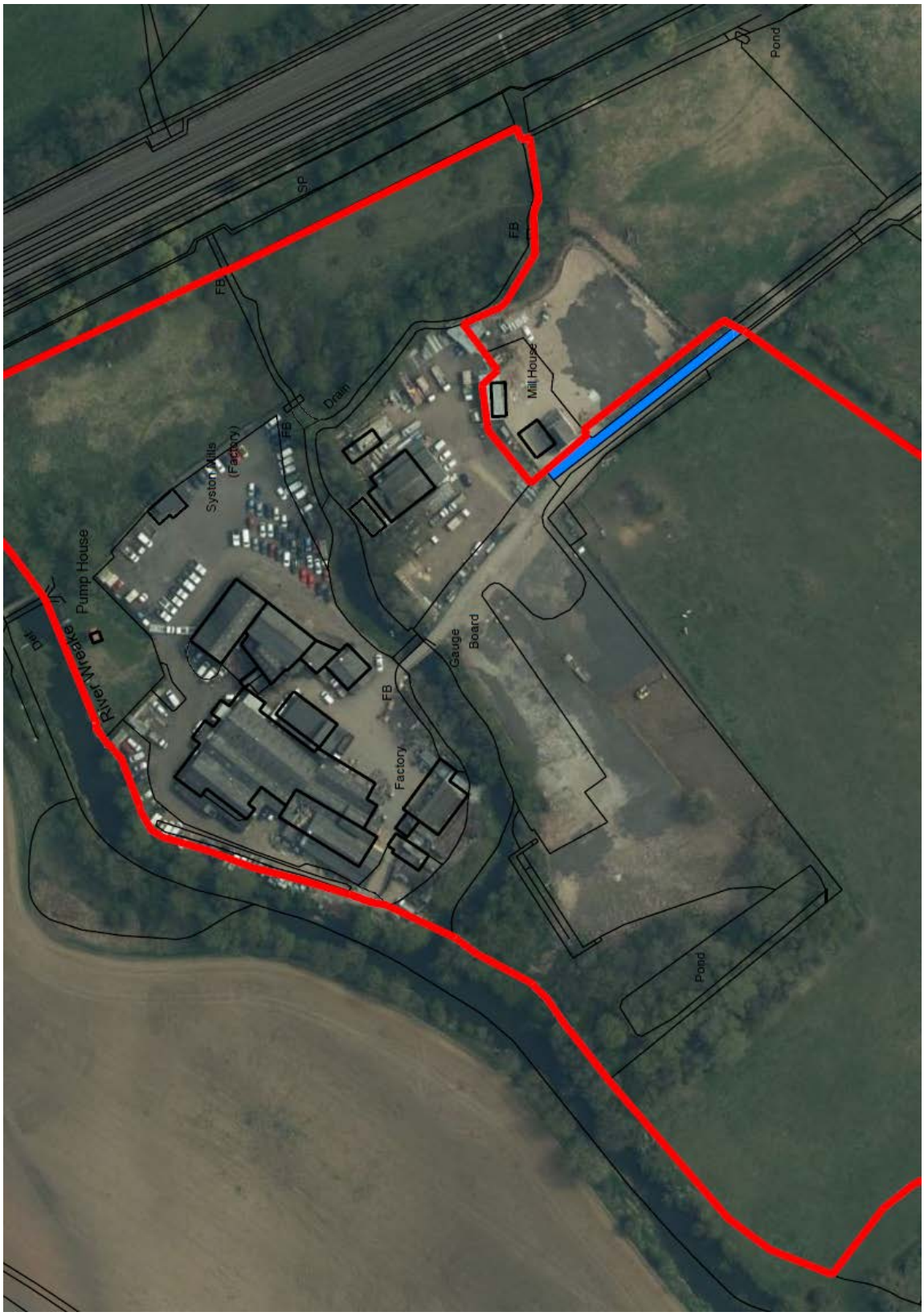
The whole site lies within the countryside.

The main group of buildings lies within Flood Zone 2, however, all the land around the site is within Flood zone 3.


HM Land Registry
Official copy of title plan
Title number LT248469
Ordnance Survey map reference SK6112SE
Scale 1:2500
Administrative area Leicestershire : Charnwood
© Crown copyright and database rights 2016 Ordnance Survey 100026316. You are not permitted to copy, sub-license, distribute or sell any of this data to third parties in any form.
N
Pump House
Syston Mills (Factory)
Works
Pond



Location Plan on Green Belt

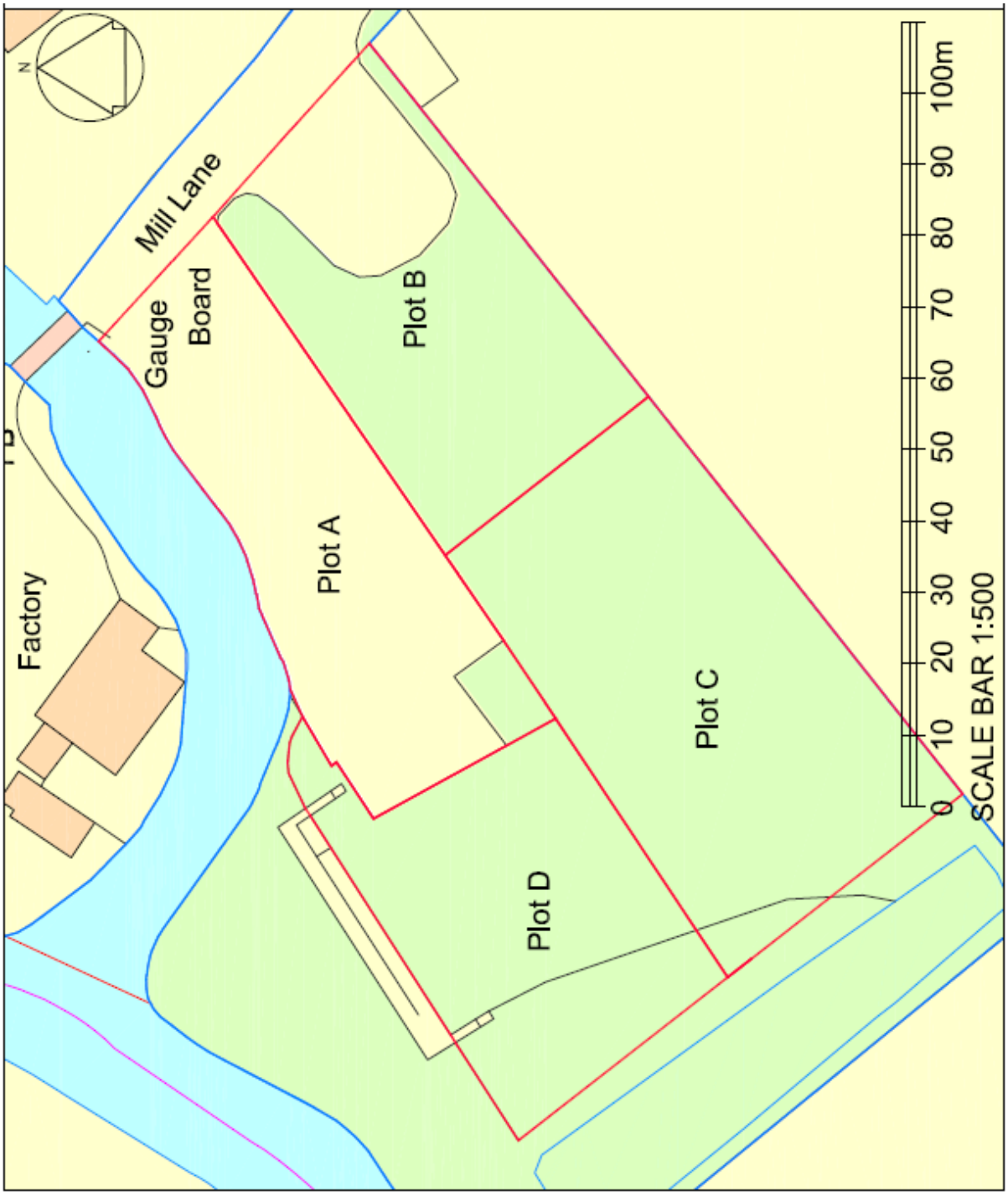


Location plan superimposed showing historically established car sale/vehicle parking on all plots a, b, c, and d for over 10 years.

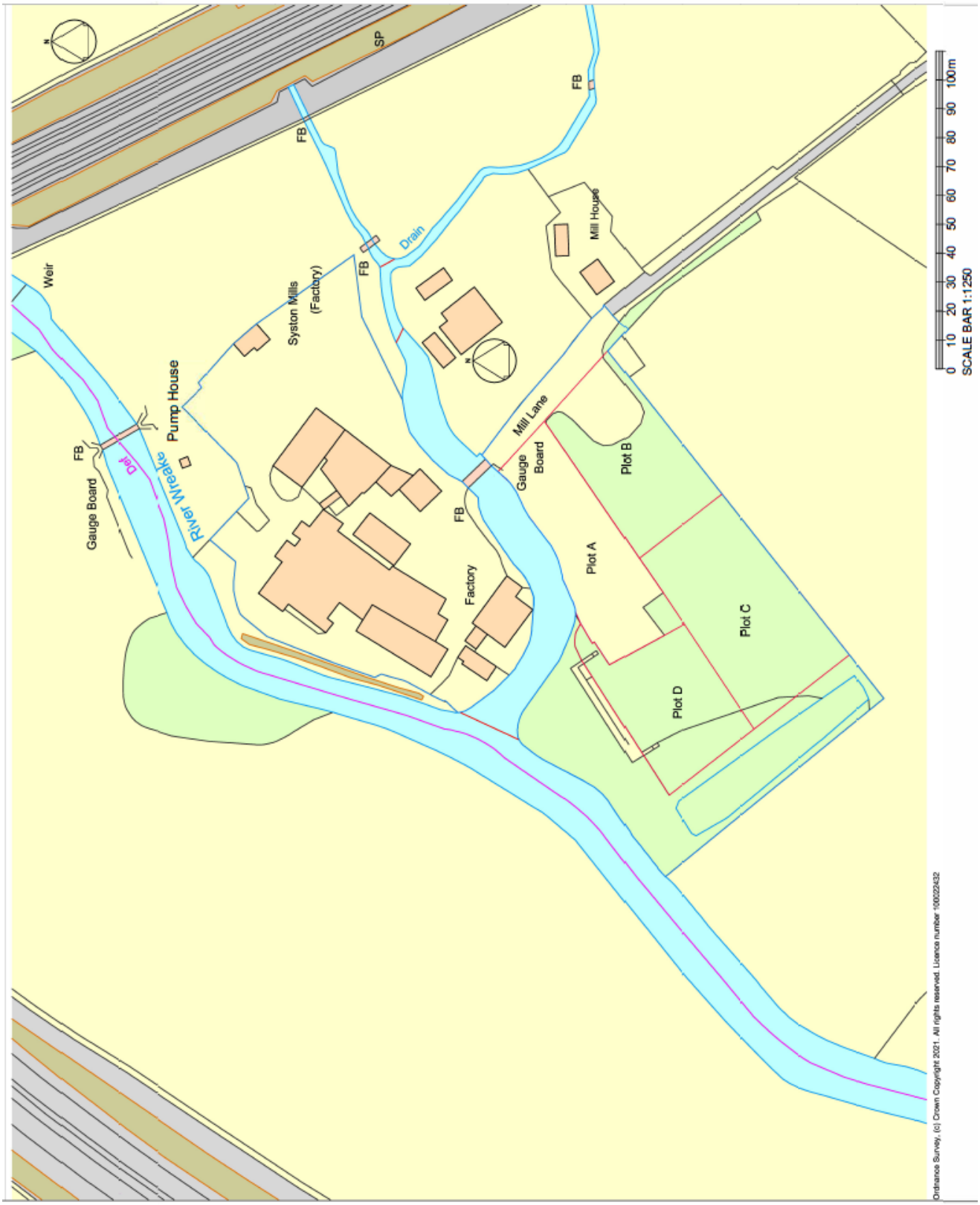
Aerial Views of Site

Aerial Views of site

Aerial Views of site



Location plan - Not to scale



Location plan - Not to scale

3. Background Context

It is understood from the planning history of the site that, Syston Mills was established long before the birth of the UK planning system. Syston Mills comprised several businesses and the site and was already well-established for employment purposes.

Among other land uses, the site was historically used for shoe manufacturing in the 1960's; storage in 1971; and for offices in 1978.

- Actually, the shoe factory was much larger, and all the growth and vegetation on the South Eastern part of the site was part of the shoe manufacturing open storage and parking

Only with the demise of the shoe factory did the overgrowth start carpeting the hitherto-utilized part of the site: hence more recent aerial photos do not do justice nor tell the correct history of the site:

Among other uses, the site was historically used for other manufacturing in 1968, storage in 1971 and for offices in 1978

Over the years and since the closure of shoe manufacturing company the site has remained as a business, commercial and employment hub with several tenants renting commercial units and carrying out several business activities with benefits to the local community

Likewise, the ownership of the Syston Mills Lane has changed hands several times and the current landlord (The Owner) is the Wealth Property Ltd. This current landlord acquired the Syston Mills Lane site on 15th December 2021.

Prior to the current owners Wealth Property taking over the ownership of the Syston Mills Lane, the previous owner had undertaken a number of works at the site dating back between 10 and 25 years ago which included the clearing of the parcels of land shown on the submitted site plan as A, B, C, and D for use as car parking areas by the tenants renting commercial units and visitors to the Syston Mills Lane site.

- In essence, the current owners simply want to revert to the original boundaries, some of which have been overgrown and give a false impression that the site is smaller than it actually is, and to make better utilization of the site: with all the benefits of employment and income generation to the area that the site offers

In this context we wish to relay to the planners the owners fervent request for support in the regeneration of the site

Please refer to the declaration statements submitted in support of this

4. Planning History

There is no relevant planning history that relates to the sites identified on the site plan as Plots A, B, C, and D.

However, there is some recent and previous planning history at the Syston Mills site which are considered relevant and listed below:

Ref. Number: P/87/1840/2

Proposal: Erection of new bridge over the stream.

Decision Date: 10/09/1987

Decision: Granted

Ref. Number: P/00/2521/2

Proposal: External alterations to industrial warehouse and office premises

Decision Date: 29/01/2001

Decision: Granted

It is noted that both applications were made more than 10 years ago and show the sites which are the subject of this application.

In addition to the above history, the location plan of the recent application reference P/20/1609/2 which was refused planning permission on 5th January 2021, clearly identifies Plot A, and Plot C as shared car parking areas.

5. Description of Existing Development

This application is for a Certificate of Lawfulness of Existing Use or Development (CLEUD) for a change of use of lands identified on the site plan as Plots A, B, C, and D to the car sale/vehicle parking (Sui Generis) and associated works. All these plots of land are now in use as car sale/vehicle parking areas.

The use is long established at these sites for over ten years and includes associated works such as surfacing, clearing of land, erection of fencing and gates to create secure compounds for car parking.

The evidence verifying the use of those plots of land is set out within the body of this statement.

6. Planning Legislation

The legislation relevant to a Certificate of Lawful Existing Use or Development ('CLUED') is Section 191 of the Town and Country Planning Act 1990 (as amended).

Section 191 advises that an application for a CLUED can be submitted to the Local Planning Authority (LPA) to ascertain whether:

a. Any existing use of building 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.

This application is made in respect of a) above and demonstrates that the lawful use of the sites identified on the site plan as Plots A, B, C, and D.

Under Section 191(2) of the Town and Country Planning Act 1990 as amended, uses are considered lawful if no enforcement action may be taken against them and they are not in contravention of any enforcement notice.

With respect to this application, a use can be considered lawful if:

- It benefits from a planning permission and has been implemented; or
- The time taken for enforcement action has expired.

The time taken for enforcement action is defined at Section 171B of the Act, with four years being the time limit associated with dwellings and ten years for other uses.

As such, in order to confirm the lawful change of use of the sites (Plots A, B, C and D) to car parking/sales/storage (Sui Generis), it must be demonstrated that the use has been either subject to a planning permission or the use has occurred for a period of more than ten years without being subject to any enforcement action.

Article 39 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 specifies the information to be provided with a CLUED application. Information is to include:

- A plan identifying the land.
- Evidence verifying the use of the land.
- A statement setting out the applicant's interest in the land.

Such evidence can include planning application documentation, ownership information and statements from individuals and other parties.

7. Evidence to Support the Application Main Issues and Consideration

The following is a factual account of the use of the land identified on the site plans as Plots A, B, C, and D. The legislative requirements for a CLUED only relate to continued occupation for at least the last 10 year; however, the use of those plots of land as car sale/vehicle parking area have been established much longer than this.

This is confirmed by the evidence set out below.

ANALYSIS OF FACT

The question of whether the Application meets the test in section 191 is, ultimately, a question of fact for the decision maker. It must be made, however, taking into account all material considerations and in accordance with the statutory guidance.

The Planning Practice Guidance: Lawful Development Certificates provides (as relevant):

“The Applicants is responsible for providing sufficient information to support an application, although a local planning authority always needs to co-operate with an Applicants who is seeking information that the authority may hold about the planning status of the land. A local planning authority is entitled to canvass evidence if it so wishes before determining an application. If a local planning authority obtains evidence, this needs to be shared with the Applicants who needs to have the opportunity to comment on it and possibly produce counterevidence”.

“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.”

The PPG:

Lawful Development Certificates provides a framework for approaching questions of fact under section 191.

In the instant case the decision maker must determine, on a balance of probabilities, whether the change of use occurred more than ten years prior to the date of the application. Where there is no evidence to contradict the Applicants' case, the correct approach is to grant the application save where the Applicants' evidence is insufficiently precise and unambiguous.

Where contrary evidence exists, the correct approach is to weigh the evidence that supports the application against the contrary evidence and consider whether, on a balance of probabilities, the alleged use had been extant for more than ten years.

For the application to succeed the Applicants must prove that the land has been in use for car sale/vehicle parking for a period exceeding ten years. The following evidence weighs in favour of that contention:

(a). The Applicant, in both her written submissions and statutory declarations given evidence of that the plots of land marked as A, B, C, and D on the site plan were used for car sale/vehicle parking for more than ten years and have retained this use until today.

(b). The Applicants' account is corroborated by three further statutory declarations each made by individuals with direct experience of the site and are still tenants at the Syston Mills Lane site.

Site visit:

The above analysis demonstrates that, in my view, there is sufficient evidence for the Council to grant the Application in the absence of a site visit.

The Council does not have a legal obligation to conduct a site visit.

It does, however, have a power to do so. It must, therefore, consider whether exercising this power is necessary to its decision-making process in relation to the Application.

Where, for example, the Council considers that it lacks information or sufficiently precise and unambiguous evidence, and such information or precision could be obtained by a site visit, then the Council must take this into account and either conduct a site visit or not hold the lack of one against the Applicants.

8. Conclusion

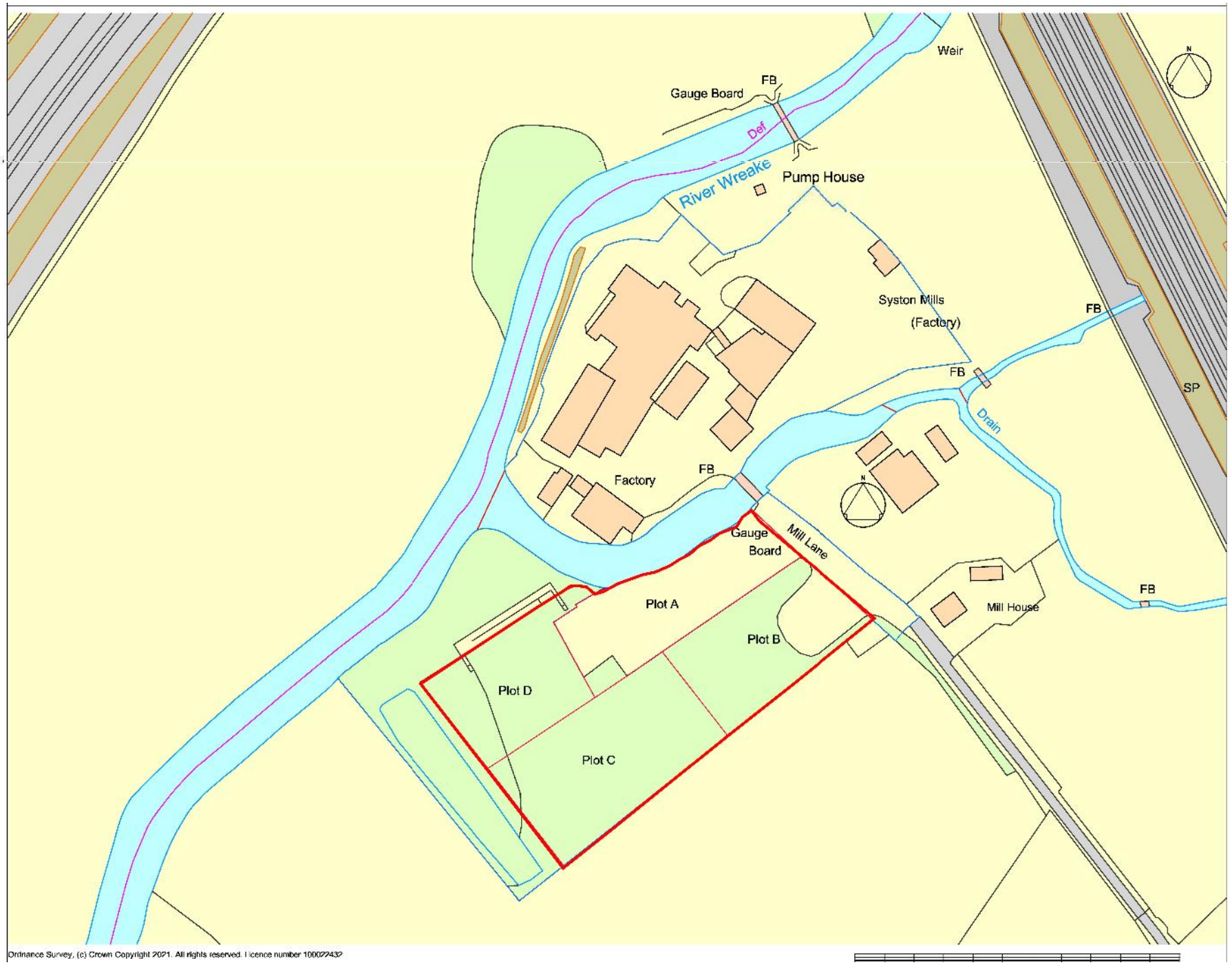
As was indicated through several points along this statement, the Syston Mills is actually larger than what meets the eye, since parts of it are overgrown with the demise of the shoe factory

Furthermore the majority area of the current, reduced size plot was already used as car parking by the tenants renting commercial units and visitors to the Syston Mills Lane site, along the past 10 years and way beyond

A framework of that have been provided through several statutory declarations submitted from the applicant himself, as such as several tenants from more than ten years.

We reiterate the owners current plea for support from the Council: in that the site be accorded the Permission / Change of Use and to consider it as a form of regeneration of employment & income to the area

Is accordance with the submitted statement, that we strongly believe that there is no reason to not Grant this application and beg your acceptance.



REV.	DESCRIPTION	REVISED BY AND DATE	APPROVED BY AND DATE
0		NP 08/02/2022	EA 08/02/2022

CONTRACTOR

OMEGA CONSULTANCY

4 Vale Parade
SW15 3PS
United Kingdom
T: +44 (0) 20 8549 4111
E: omegagoldgroup@gmail.com
W: www.omegagold.co.uk www.omeganext.co.uk

Status
PLANNING APPLICATION

Contract
Mill lane, Syston, Leicester, LE7 1NS

0

Title
PROPOSAL LOCATION PLAN

JOB No.	SCALE	ORG. INITIATED BY	REVISIONS
	1/1250@A3	NP	0
DRAWING No.	DATE	ORG. CHECKED BY	
A-101	FEB-2022	EA	

1:500 5m 10 20 30 40 50 60 70 80 90
1:50 1m 2 3 4 5 6 7 8 9
1:1250 10 20 30 40 50 100
1:100 1m 2 3 4 5 6 7 8 9 10

Appendix D

Decision Notice P/22/0061/2

TOWN AND COUNTRY PLANNING ACT 1990
SECTIONS 191 AND 192
(AS AMENDED BY SECTION 10 OF THE PLANNING AND COMPENSATION ACT 1991)

Town and Country Planning (Development Management Procedure) (England) Order 2010

NOTICE OF REFUSAL OF CERTIFICATE OF LAWFUL USE OR DEVELOPMENT

To the Applicant:
Ashpal Singh Babbar
Wealth Property Ltd
153 Norwood Road
Southall
Middlesex
London
UB2 4JB

Date of Application: 21.02.2022

Application No: P/22/0061/2

Application land or site: Land at Syston Mill, Mill Lane, Syston, Leicester, LE7 1NS
("the Land")

CHARNWOOD BOROUGH COUNCIL hereby refuses your application for a Certificate of Lawfulness for an Existing Use or Development in respect of those elements of it as are set out and detailed in the schedule to this Notice for the following reasons:

1. Insufficient evidence has been provided to prove on the balance of probability that the Land has been used continuously for car sales/parking (suis generis) and associated works for more than ten years preceding the date of this Application

Dated: 8th June 2022

Signed……..
Adrian Ward, Head of Strategic Support

On behalf of: **Charnwood Borough Council**
Charnwood Borough Council
Southfield Road, Loughborough
Leicestershire LE11 2TX
Ref: 1090-1318

SCHEDULE

The use of the Land, shown edged with a bold red line on the attached Plan and described, for the following activity:

1. Use of Land as car sales/parking (Sui Generis) and associated works.

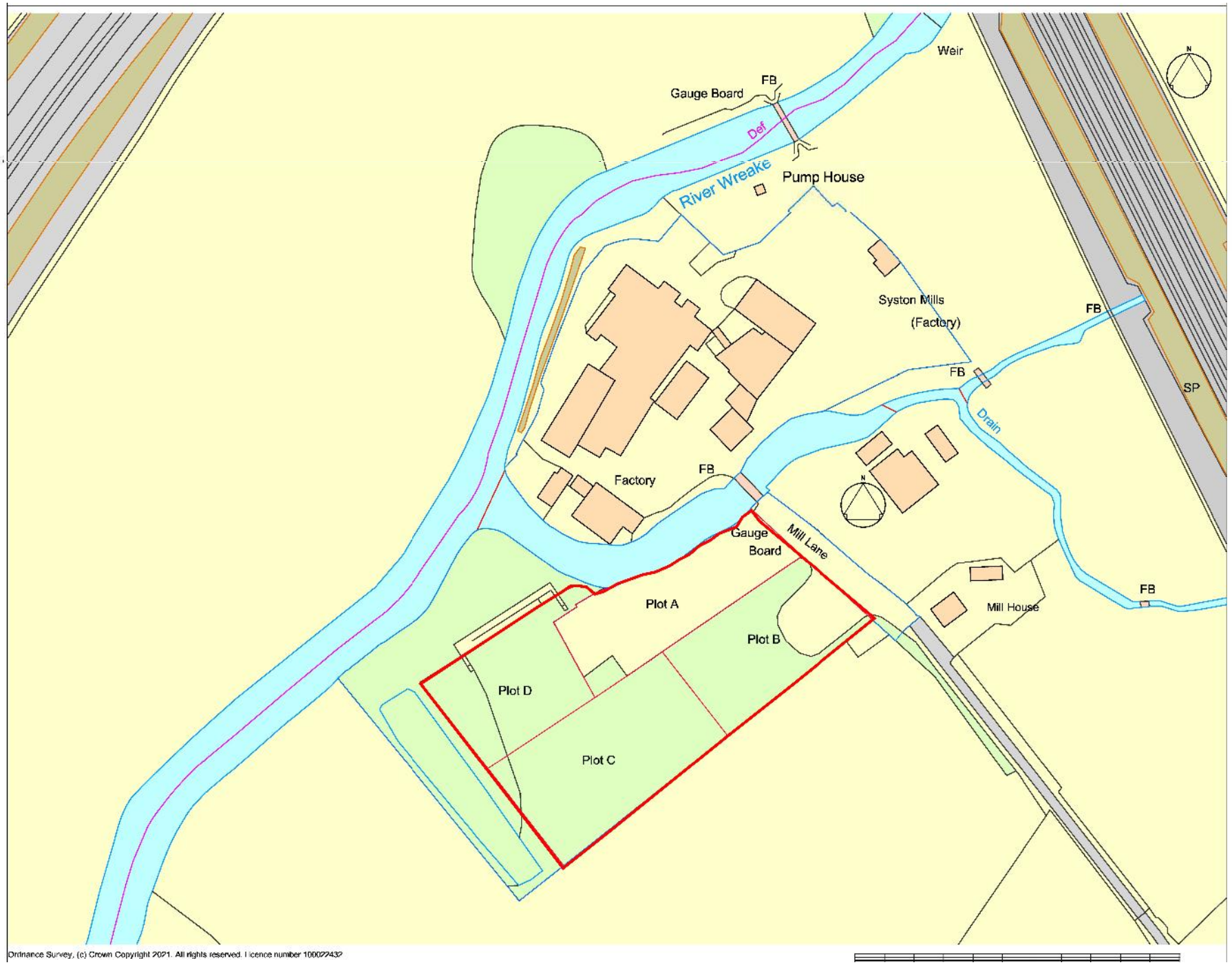
NOTES TO APPLICANT

If you are aggrieved by the decision of the Council you may appeal to the Secretary of State pursuant to Section 195 of the Town and Country Planning Act 1990. Your appeal should be made in writing to:

The Planning Inspectorate
Temple Quay House
2 The Square
Temple Quay
Bristol
BS1 6PN

Telephone No: 0117 372 8000 (please ask for the Planning Inspectorate)
Web Site: www.planningportal.gov.uk

Attachment: Plan



REV.	DESCRIPTION	REVISED BY AND DATE	APPROVED BY AND DATE
0		NP 08/02/2022	EA 08/02/2022

CONTRACTOR

OMEGA CONSULTANCY

4 Vale Parade
SW15 3PS
United Kingdom
T: +44 (0) 20 8549 4111
E: omegagoldgroup@gmail.com
W: www.omegagold.co.uk www.omeganext.co.uk

Status
PLANNING APPLICATION

Contract
Mill lane, Syston, Leicester, LE7 1NS

0

Title
PROPOSAL LOCATION PLAN

JOB No.	SCALE	ORG. INITIATED BY	REVISIONS
	1/1250@A3	NP	0
DRAWING No.	DATE	ORG. CHECKED BY	
A-101	FEB-2022	EA	

1:500 5m 10 20 30 40 50 60 70 80 90
1:50 1m 2 3 4 5 6 7 8 9
1:1250 10 20 30 40 50 100
1:100 1m 2 3 4 5 6 7 8 9 10

Appendix E

Letter dated 09 Feb 2023

Charnwood

Planning and Regeneration Service

Surbeer Singh Nagpal & Asphal Singh Babbar
C/o Mrs Plenasio
Omega Next Generation
4 Vale Parade
London
SW15 3PS

Sent by email

Development Management
Southfield Road
Loughborough
Leicestershire
LE11 2TN

Please Contact: Andrew Muir
Direct Line: 07521868189
Email: development.control@charnwood.gov.uk

09 February 2023

Dear Surbeer Singh Nagpal & Asphal Singh Babbar

ENQUIRY REFERENCE: E/21/0183
ALLEGED BREACH: Material change of use of land and operational development
LOCATION: Syston Mill, Mill Lane, Syston, Leicestershire

I can confirm that my predecessor Mr Johnstone has now left the Council. Therefore, this matter has been passed to me to resolve.

I have been reviewing the content of the enforcement file and the failed Certificate of Lawfulness application. I have some queries and questions based on your responses to the Planning Contravention Notice (the "PCN"). I will raise these in the order of the questions within that Notice.

1. Noted. However, I would be grateful under what lawful premise are the business on the sites detailed on the plans at Sheet 1 and Sheet 2 attached to the PCN currently operating if there are no planning permissions in place for their business operations.

2. Noted.

3. Noted.

4. Please answer this question in full as you have only responded in respect of Sheet 2. You need to provide the same details for the tenants on the mill site as detailed on Sheet 1.

5. Did your client purchase the property with sitting tenants or are all the current tenants new to the site as of the date of purchase. Your response is contrary to the Statutory Declaration made by Dave Knapp or is it that the Statutory Declaration is contrary to your response.

6. Please answer this question in full as you have only responded in respect of Sheet 2. You need to provide the same details for the tenants on the mill site as detailed on Sheet 1.

7. Please answer this question in full as you have only responded in respect of Sheet 2. You need to provide the same details for the mill site as detailed on Sheet 1.

8. I understand from your answer that the Mill buildings and its surrounding land are not used for any business purposes and never have. Is this correct. If not, please explain in full why not.

9. The tenants that you have confirmed are these the same tenants. If not please state all current tenants, when their tenancy began, and the nature of their use or operation on the land over the past ten years.

10. Noted. If the answer to 9 above is positive then please state any previous tenants, when their tenancy began and ended, and the nature of their use or operation on the land.

11. Noted. If changes have occurred, please provide a map detailing the changes.

12. Noted. Please confirm if any other works have occurred since the submission of the previous information.

13. Noted. Please confirm if any other uses occurred since the submission of the previous information.

14. I note from the red line plan enclosed at page 6 within your design and access statement for the failed Certificate of Lawfulness. That you have failed to answer this question. Please answer the question in full.

15. Noted.

16. Noted.

I would be grateful if you would respond to these queries and questions at your earliest opportunity and within 14 days of the date of this letter

If you have any questions or require further information, please contact me on 07521868189 or email: development.control@charnwood.gov.uk. Please quote reference number E/21/0183 whenever you contact us.

Yours sincerely

A. Muir

Andrew Muir
Senior Planning Enforcement Officer

Appendix F

Letter to landowners January 2024

Planning and Regeneration Service

Surbeer Singh Nagpal
Director
Wealth Property Limited
153 Norwood Road
Southall
Middlesex
UB2 4JB

Development Management
Southfield Road
Loughborough
Leicestershire
LE11 2TN

Please Contact: Andrew Muir
Direct Line: 07521 868189
Email: development.control@charnwood.gov.uk

29 January 2024

Dear Surbeer Singh Nagpal

ENQUIRY REFERENCE:	E/21/0183
ALLEGED BREACH:	Material change of use of buildings and operational development
LOCATION:	Syton Mill, Mill Lane, Syston, Leicestershire

I refer to the above matter and my recent site visit and a review of the planning history and aerial photography for this site.

It appears that the extents of the commercial/industrial activity has intensified and expanded into the open countryside. I also note that the roof of the office building has been replaced in recently, that the fire damaged building 'E1/E2' has been recently rebuilt, and a new building has been constructed on the 'External Parking'. The planning history does not show that these developments have been applied for or granted planning permission.

I have written to you as landowner because this Local Planning Authority considers you to be ultimately responsible for these matters. If it is a case that either you or your tenants wish to retain these unauthorised developments, then a retrospective planning application will be required. Such an application will need to be submitted within 21 days of the date of this letter. Should the Local Planning Authority not receive such an application or applications then this matter will be referred to the Head of Planning and Growth for consideration of enforcement action.

In the meantime, if you have any questions or require further information, please contact me on 07521 868189 or email: development.control@charnwood.gov.uk. Please quote reference number E/21/0183 whenever you contact us.

Yours sincerely

A. Muir

Andrew Muir
Senior Planning Enforcement Officer

Appendix G

Burdle v Secretary of State for the Environment [1972] 1 WLR 1207

All England Law Reports/1972/Volume 3 /Burdle and another v Secretary of State for the Environment and another - [1972] 3 All ER 240

Burdle and another v Secretary of State for the Environment and another

QUEEN'S BENCH DIVISION

LORD WIDGERY CJ, WILLIS AND BRIDGE JJ

20, 22 JUNE 1972

Town and country planning - Development - Material change of use - Planning unit - Determination of what constitutes appropriate unit - Factors to be considered - Planning unit to be taken as whole unit of occupation unless smaller unit recognisable as site of activities amounting to a separate use physically and functionally.

A occupied a site on which there stood a dwelling-house to which was attached a lean-to annexe and certain other buildings. On that site, within the open curtilage, A had carried on, since a time prior to 1963, the business of a scrap yard and car breakers' yard. As an incident to that business from time to time he sold on the site car parts arising from the break-up of cars and occasionally sold car parts acquired from elsewhere. In 1965 the appellants purchased the site and substantially reconstructed the lean-to annexe, in particular by providing it with external display windows. They started using that building for the sale, on a substantial scale, of vehicle spare parts acquired new from manufacturers and for the sale of other goods. In February 1971 the local planning authority served an enforcement notice which stated that it appeared that 'a breach of planning control has taken place namely the use of premises ... as a shop for the purpose of sale of inter alia motor car accessories ... without the grant of planning permission ... ' The appellants appealed to the Secretary of State and both parties presented the case to the inspector on the footing that the whole site was the planning unit with which the inquiry was concerned, the appellants contending that, looking at the site as a whole, the intensification of retail sales had not been such as to amount to a material change of use. The inspector concluded that whether or not the notice was 'properly directed to the whole property or to the annexe' the appeal should fail. In his decision letter however the Secretary of State stated that the appellants' argument that 'the whole site was used for sales and should be regarded as a long established shop' could not be accepted having regard to the definition of 'shop' in the Town and Country Planning Acts and the enforcement notice as worded could relate only to the lean-to annexe. He therefore considered and dismissed the appeal on that limited basis. On appeal,

Held - (i) The reasons given by the Secretary of State for concluding that the lean-to annexe, rather than the site as a whole, was the appropriate planning unit for consideration could not be supported. Although the word 'shop' was inappropriate to describe the whole site it did not follow that the accident of language used by the authority in framing the enforcement notice could determine conclusively what was the planning unit to which attention was to be directed (see p 243 *j* to p 244 *a*, post).

(ii) In determining what was the appropriate planning unit a useful working rule was to assume that it was the whole unit of occupation, unless and until some smaller unit could be recognised as the site of activities which amounted in substance to a separate use both physically and functionally. Since it was impossible to conclude, on the factual and evidential material available, that the Secretary of State would have come to the conclusion that the lean-to annexe was the appropriate planning unit if he had approached the matter on that basis, the appeal would be allowed and the case sent back to him for reconsideration (see p 244 *b d e h* and

j to p 245 *c*, post); dictum of Diplock LJ in *G Percy Trentham Ltd v Gloucestershire County Council* [1966] 1 All ER at 704 applied.

Notes

For a material change of use constituting development, see 37 *Halsbury's Laws* (3rd Edn) 259-263, para 366, and for cases on the subject, see 45 *Digest* (Repl) 328-334, *14-30*.

Case referred to in judgments

Trentham (G Percy) Ltd v Gloucestershire County Council [1966] 1 All ER 701, [1966] 1 WLR 506, 130 JP 179, 64 LGR 134, *Digest* (Cont Vol B) 689, *30d*.

Cases also cited

Bendles Motors Ltd v Bristol Corporation [1963] 1 All ER 578, [1963] 1 WLR 247.

Wipperman and Buckingham v London Borough of Barking (1965) 130 JP 103.

Appeal

By an originating notice of motion dated 4 February the appellants, Derek Stanley Burdle and Dennis Williams, sought an order that the matter of two enforcement notices pursuant to s 47 of the Town and Country Planning Act 1962 and s 15 of the Town and Country Planning Act 1968 dated 3 February 1971 and made by the second respondents, New Forest Rural District Council ('the authority'), and a decision of the first respondent, the Secretary of State for the Environment, pursuant to s 16 of the 1968 Act notified by letter dated 7 January 1972 might be remitted to the Secretary of State for the Environment for rehearing and determination together with the opinion or direction of the court on the matters set out in the grounds of appeal. The facts are set out in the judgment of Bridge J.

R J Roddis for the appellants.

Gordon Slynn for the Secretary of State.

Alan Fletcher for the authority.

22 June 1972. The following judgments were delivered.

BRIDGE J

delivered the first judgment at the invitation of Lord Widgery CJ. This is an appeal under s 180 of the Town and Country Planning Act 1962 from a decision of the Secretary of State for the Environment given in a letter dated 7 January 1972 upholding, subject to variation, an enforcement notice which had been served by the New Forest Rural District Council as delegate of the local planning authority on the present appellants. The appellants occupy a site at Ringwood Road, Netley Marsh, in the New Forest area, which has a frontage of 75 feet and a depth of 190 feet, and on which there stand a dwelling-house to which is attached a lean-to annexe and a number of other buildings which it is not necessary to describe.

The relevant history of the matter is that before the end of 1963, which of course in relation to changes of use is the critical date under the Town and Country Planning Act 1968, the appellants' predecessor in title, a Mr Andrews, carried on, on the site, within the open curtilage, the business of a scrap yard and a car breakers' yard. As an incident of that business he effected from time to time on the site retail sales of car parts arising from the cars broken up on the site. There was some evidence at the inquiry at which this history emerged of a very limited scale of retail sales of car parts arising from sources other than the break-up of vehicles in the course of the breakers' yard business.

The lean-to annexe adjoining the dwelling-house was used by Mr Andrews as an office in connection with the scrap yard business. In 1965 the present appellants purchased the property; whereas Mr Andrews had carried on business under the modest title of 'New Forest Scrap Metals', the present appellants promptly changed the title to the more grandiose 'New Forest Autos'. They found the lean-to annexe in a somewhat decrepit state, and effected a substantial reconstruction and alteration of it which clearly materially altered its appearance. Inter alia they provided it with two external display windows. They started to use that building for retail sales on a

substantial scale for vehicle spare parts not arising from the break-up of vehicles as part of the scrap yard business, but new spares of which the appellants had themselves been appointed stockists by the manufacturers. They also embarked on retail sale of camping equipment and the goods to be sold by retail from the annexe lean-to were displayed both in the new shop windows if one could so call them, and on shelves within the buildings. Finally it is to be observed that as well as advertising themselves as stockists of spare parts for all makes of motor cars, they included in the advertising material the phrase 'New accessories and spares shop now open'.

Those activities prompted the local planning authority to serve on 3 February 1971 the enforcement notice which is the subject of the appeal to this court. That notice recites:

> '... that it appears to the Council: That a breach of planning control has taken place namely the use of premises at New Forest Scrap Metals, Ringwood Road, Netley Marsh, as a shop for the purpose of the sale inter alia of motor-car accessories and spare parts without the grant of planning permission required in that behalf in accordance with Part III of the Town and Country Planning Act, 1962.

The steps required to be taken by the notice are the discontinuance of the use of the premises as a shop and the restoration of the premises to their condition before the development took place. Concurrently with that notice with which the court is concerned, it is to be observed merely as a matter of history that there was also served an enforcement notice directed at the building alterations which had been effected to the lean-to annexe, but as the Secretary of State allowed an appeal against that enforcement notice, it is unnecessary for us to consider it.

The enforcement notice alleging a change of use, be it observed, uses the perhaps ambiguous expression 'premises' to indicate the unit of land to which it was intended to apply. We were told in the course of argument by counsel for the authority that the authority's intention was to direct this notice at the whole of the appellants' site; it alleged a material change of use of the whole site. It seems to have been so understood by the appellants, and when the matter came before an inspector of the Department of the Environment following the appeal to the Secretary of State by the appellants against the notice, both parties presented their cases on the footing that the whole site was the planning unit with which the inquiry was concerned.

The authority's case was that the change in the character and degree of retail sales from the site, as a matter of fact and degree, effected a material change of use of the whole site which had taken place since the beginning of 1964. Indeed, in these proceedings, counsel for the authority has submitted before us that that is

still the proper approach which the Secretary of State should adopt if the matter goes back to him. On that view, so counsel said, the notice as applied to the whole site should be upheld subject to any necessary reservation to preserve to the appellants their right to effect retail sales in the manner and to the extent that such sales were effected by their predecessor before the beginning of 1964.

The appellants' case at the inquiry was in essence that, as a matter of fact and degree, looking at the site as a whole, the intensification of retail sales had not been sufficient to amount to a material change of use.

The inspector, after indicating his findings of primary fact, expressed his conclusions thus:

> 'The legal implications of the above facts are matters for the consideration of the Secretary of State and his legal advisers but it appears to me, from the almost complete absence of reference to wholesale deliveries, that the original business was based on the scrapyard, grew out of the then proprietor's specialisation in the Austin "Seven", an obsolete vehicle, and would not have survived as a mainly retail business. In contrast, while sales of salvaged spares survive, the combination of advertising with improved facilities for display, and the emphasis on new

> items in that display, all now support the appellants' claim that the annexe is a shop. But in becoming a shop a material change has taken place, without planning permission and later than 1 January 1964. Whether or not notice A [which is the use notice] is properly directed to the whole property or to the annexe, the appeal should therefore fail on ground (d).'

I read that conclusion as indicating first that the inspector was aware, although it does not appear from the report that it was raised by the parties, that there was an issue for consideration as to what was the appropriate planning unit to be considered, either the whole site on the one hand, or on the other hand the lean-to annexe, but he took the view that whichever unit one considered, there had been a material change of use, and accordingly he thought the notice could be upheld on that footing. Speaking for myself, if the Secretary of State had adopted and endorsed that view, I do not see that such a conclusion could have been faulted in this court as being erroneous in point of law.

But the Secretary of State did not simply endorse his inspector's conclusion; what he said in the decision letter was this:

> 'Both enforcement notices allege development associated with a shop. It is clear that enforcement notice B [that is the notice relating to the building operations] relates to the building called variously the annexe or lean-to. Enforcement notice A refers to the use of premises as a shop and at the inquiry it was argued for your clients that the whole site was used for sales and should be regarded as a long established shop. This is not an argument that can be accepted in the light of the clearly established definition of a shop for the purposes of the Town and Country Planning Acts as a building used for the carrying on of any retail trade etc The view is taken that enforcement notice A as worded can relate only to the lean-to or annexe. It is proposed to amend the notice to make this clear. The appeal against enforcement notice A has been considered on that limited basis.'

The Secretary of State then went on to ask himself the question: has there been a material change of use of the lean-to annexe? and on the facts, as it seems to me inevitably, he answered that question in the affirmative. Given that the lean-to annexe was the appropriate planning unit for consideration, the decision of the Secretary of State that there had been a material change of use of it was, as I think, clearly right, and, in spite of the argument of counsel for the appellants, I cannot accept that the Minister in any way exceeded his jurisdiction in ordering that the scope of the notice be cut down if it was originally intended to apply to the whole site, so as to limit the ambit of its operation to the lean-to annexe. As such, that was a variation of the notice in favour of the appellants.

But the real complaint and grievance of the appellants is that the Secretary of State has for insufficient or incorrect reasons directed his mind to the wrong planning unit and thereby deprived them of a consideration and decision by the Secretary of State, as opposed to the inspector, of the real question which the appellants

say should have been considered, namely: has the change of activities on the whole site effected a change of use of the whole site which is the appropriate planning unit to be considered?

For my part I am unable to accept that the reasons as expressed by the Secretary of State in his decision letter were good reasons for concluding that the lean-to annexe was the appropriate planning unit for consideration. I accept at once that whether one uses the definition of 'shop' in the Town and Country Planning (Use Classes) Order 1963[a] or the ordinary dictionary meaning of the word 'shop', it is really an absurdity to describe the whole of this site as a shop, but what I cannot

[a] SI 1963 No 708

accept is that the accident of language which the planning authority choose to use in framing their enforcement notice can determine conclusively what is the appropriate planning unit to which attention should be directed.

What, then, are the appropriate criteria to determine the planning unit which should be considered in deciding whether there has been a material change of use? Without presuming to propound exhaustive tests apt to cover every situation, it may be helpful to sketch out some broad categories of distinction.

First, whenever it is possible to recognise a single main purpose of the occupier's use of his land to which secondary activities are incidental or ancillary, the whole unit of occupation should be considered. That proposition emerges clearly from the case of *G Percy Trentham Ltd v Gloucestershire County Council* ([1966] 1 All ER 701 at 704, [1966] 1 WLR 506 at 513), where Diplock LJ said:

> 'What is the unit which the local authority are entitled to look at and deal with in an enforcement notice for the purpose of determining whether or not there has been a "material change in the use of any buildings or other land"? As I suggested in the course of the argument, I think that for that purpose what the local authority are entitled to look at is the whole of the area which was used for a particular purpose including any part of that area whose use was incidental to or ancillary to the achievement of that purpose.'

But, secondly, it may equally be apt to consider the entire unit of occupation even though the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to another. This is well settled in the case of a composite use where the component activities fluctuate in their intensity from time to time, but the different activities are not confined within separte and physically distinct areas of land.

Thirdly, however, it may frequently occur that within a single unit of occupation two or more physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose (together with its indicental and ancillary activities) ought to be considered as a separate planning unit.

To decide which of these three categories apply to the circumstances of any particular case at any given time may be difficult. Like the question of material change of use, it must be a question of fact and degree. There may indeed be an almost imperceptible change from one category to another. Thus, for example, activities initially incidental to the main use of an area of land may grow in scale to a point where they convert the single use to a composite use and produce a material change of use of the whole. Again, activities once properly regarded as incidental to another use or as part of a composite use may be so intensified in scale

and physically concentrated in a recognisably separate area that they produce a new planning unit the use of which is materially changed. It may be a useful working rule to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally.

It may well be that if the Secretary of State had applied those criteria to the question: what was the proper planning unit which fell for consideration in the instant case? he would have concluded on the material before him that the use of the lean-to annexe for purposes appropriate to a shop had become so predominant and the connection between that use and the scrap yard business carried on from the open parts of the curtilage had become so tenuous that the lean-to annexe ought to be regarded as a separate planning unit.

But for myself I do not think it is possible on the factual and evidential material which is before this court for us to say that that was by any means an inevitable

conclusion at which the Secretary of State was bound to arrive, and that being so I do not think it would be appropriate for us to usurp his function of deciding the question: what is the appropriate planning unit here? to be considered as a matter of fact and degree. Accordingly I reach the conclusion that this appeal should be allowed and that we should send the case back to the Secretary of State with a direction to reconsider his decision in the light of the judgment of this court.

WILLIS J.

I agree.

LORD WIDGERY CJ.

I entirely agree for the reasons so fully and clearly given by Bridge J.

Appeal allowed.

Solicitors: Heppenstall, Rustom & Rowbotham, Lymington (for the appellants); The Solicitor, Department of the Environment; Sharpe, Pritchard & Co (for the council).

Jacqueline Charles Barrister.

Appendix H

Murfitt v Secretary of State for the Environment and East Cambridgeshire DC (1980)

Murfitt v. Secretary of State for the Environment and Another

QUEEN'S BENCH DIVISION—DIVISIONAL COURT

WALLER L.J. AND STEPHEN BROWN J.

May 6, 1980

Town and Country Planning—Enforcement notice—Provision for land to be restored to condition prior to development in accordance with scheme to be agreed with local planning authority or determined by Secretary of State—Validity—Enforcement notice alleging material change of use of site to use for parking of heavy goods vehicles—Requiring discontinuance of use and restoration of site to condition prior to development—Restoration involving removal of hardcore vehicle standing—Hardcore laid down more than four years previously—Whether requirement of removal intra vires—Whether laying down hardcore building, mining, engineering or other operation in respect of which enforcement action barred after four years—Town and Country Planning Act 1971 (*c.* 78), ss. 87(3)(*a*), (6)(*a*)(*b*), 88 (1)(*c*)(*d*), (5).[1]

The appellant started an agricultural plant hire and haulage business in 1959. By the end of 1963, the farmyard used for the parking of vehicles and equipment had been extended to include about 15 yards of adjoining land, that extension being filled with hardcore, a portable office and two storage tanks. After 1964, the appellant used the land for the purpose of parking heavy goods vehicles in connection with a haulage business. The respondent local planning authority served an enforcement notice on him alleging that that was a material change of use and requiring him to cease using the site for the parking of heavy goods vehicles and to restore the land to its condition before the development had taken place. The appellant appealed against the notice to the Secretary of State, and the appeal was determined by an inspector.[2] The inspector amended the notice to add to the allegation that the material change of use was to use for the parking of heavy goods vehicles

[1] Town and Country Planning Act 1971, s. 87: ". . . (3) Where an enforcement notice relates to a breach of planning control consisting in—(*a*) the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land; . . . it may be served only within the period of four years from the date of the breach. . . . (6) An enforcement notice shall specify—(*a*) the matters alleged to constitute a breach of planning control; (*b*) the steps required by the authority to be taken in order to remedy the breach, that is to say steps for the purpose of restoring the land to its condition before the development took place . . .; . . ."

s. 88: " (1) A person on whom an enforcement notice is served, . . . may, . . . appeal to the Secretary of State against the notice on any of the following grounds —. . . (*c*) in the case of a notice which, by virtue of section 87(3) of this Act, may be served only within the period of four years from the date of the breach of planning control to which the notice relates, that that period has elapsed at the date of service; (*d*) in the case of a notice not falling within paragraph (*c*) of this subsection, that the breach of planning control alleged by the notice occurred before the beginning of 1964; . . . (5) On the determination of an appeal under this section, the Secretary of State shall give directions for giving effect to his determination, including, where appropriate, directions for quashing the enforcement notice or for varying the terms of the notice in favour of the appellant; and the Secretary of State may— . . . (*b*) determine any purpose for which the land may, in the circumstances obtaining at the time of the determination, be lawfully used having regard to any past use thereof. . . ."

[2] See Act of 1971, Sched. 9.

the words " in connection with the haulage business," found that the part of the site adjacent to the farm had been used for the parking of goods vehicles since before 1964 and deleted that area from the notice and varied the requirement of the notice that the land should be restored to its condition before the development had taken place by substituting the terms: " that the land shall be restored in accordance with a scheme to be agreed with the local planning authority or in default of such agreement as shall be determined by the Secretary of State." He otherwise dismissed the appeal. The appellant appealed, contending, first, that the inspector had had no power to vary the notice to require the land to be restored in accordance with a scheme to be agreed with the local planning authority or determined by the Secretary of State, secondly, that the alleged breach of planning control alleged by the enforcement notice was the making of a material change of use of the land; that it was not directed to the carrying out of building, engineering, mining or other operations; that the placing of hardcore on the site had been such an operation; and that in such a case enforcement proceedings could only be taken in respect of development within a period of four years prior to the service of the notice.

Held, dismissing the appeal, (1) that the variation of the enforcement notice to provide for the land to be restored in accordance with a scheme to be agreed with the local planning authority or determined by the Secretary of State had been within the inspector's powers and was, further, a variation that should be construed as being, within section 88 (5) of the Town and Country Planning Act 1971, a variation in favour of the appellant.

(2) That it had been permissible for the enforcement notice, requiring the discontinuance of the use of the site for the purpose of parking heavy goods vehicles, to require also the restoration of the land, as a physical matter, to its condition before the development had taken place, including the removal of the hardcore.

APPEAL from the Secretary of State for the Environment.

The facts are stated by Stephen Brown J.

Geraint Jones for the appellant, Michael James Murfitt.

Simon D. Brown for the first respondent, the Secretary of State.

The second respondents, the East Cambridgeshire District Council, were not represented.

Waller L.J. I will ask Stephen Brown J. to deliver the first judgment.

Stephen Brown J. This is an appeal by Michael James Murfitt against the decision of the Secretary of State in relation to an enforcement notice dated July 5, 1977, that was served on him by the East Cambridgeshire District Council in respect of his use of certain land at Camel Road, Littleport, Cambridgeshire, allegedly for the purpose of parking heavy goods vehicles. The land that was the subject of the enforcement notice is an area of land some three acres or thereabouts in extent.

The history of the matter is that the appellant is, and was, the occupier of this particular land. The inspector who held the public inquiry into the appellant's appeal against the enforcement notice on March 3, 1978, found certain undisputed facts. They were that the appellant started an agricultural plant hire and haulage business in 1959. The vehicles used in connection with that plant hire and haulage

business were parked in a farmyard that formed part of the site featuring in this appeal. All those vehicles and equipment were originally used in connection with agricultural contract work. By the end of 1963, the farmyard itself had been extended to include about 15 yards of adjoining agricultural land to the east. That extension was filled with hardcore, a portable office and two storage tanks placed in the yard for use in connection with the business.

After 1964 [*sic*], the business continued to expand, and other haulage firms were taken over by the appellant. Apparently, the appellant was first licensed to operate two eight and a half ton tipper lorries in 1966, and it was one of the undisputed findings of the inspector that, since 1968, the site had been rated as a vehicle park. At the time of service of the enforcement notice, and at the date of the public inquiry, the site was used for parking about 50 trailers and for the refuelling of lorries operated by the appellant's transport business, which had been based at their main depot in Wisbech Road since about 1975.

The enforcement notice required the appellant to cease using the site for the parking of heavy goods vehicles and further required him to restore the land to its condition before the development had taken place.

The inspector who made the decision under the powers that devolved on him,[3] amended the enforcement notice, which charged the appellant with having made a material change of use, which was to use for the purpose of parking heavy goods vehicles, to add the words " in connection with the haulage business." Nothing turns on that particular amendment.

The inspector found in relation to the small part—what was called the " front part "—of the site adjacent to the farm that it had been used since before the material date of [January 1, [1964,] for the purpose of parking goods vehicles, and he deleted that area from the enforcement notice.

In relation to the remainder of the site, the inspector, acting on behalf of the Secretary of State, confirmed the enforcement notice and dismissed the appellant's appeal to the Secretary of State in relation thereto, but he made a variation in the requirement of the enforcement notice to restore the land to its condition before the development had taken place by substituting these terms: " that the land shall be restored in accordance with a scheme to be agreed with the local planning authority or in default of such agreement as shall be determined by the Secretary of State."

The appellant submits two points of substance in support of his appeal. The first that he took in point of time was one that related to the variation to which I have just referred. Mr. Jones, who has argued this matter attractively on his behalf, contends that that variation so affects the validity of the enforcement notice itself as to

[3] See Act of 1971, Sched. 9.

vitiate it, and he contends that this court should take the course of remitting the matter to the Secretary of State to consider the position. It is his submission that the suggestion of seeking agreement with the local planning authority, or, in default of reaching any such agreement as to the means of restoring the land to its previous use, reference to the Secretary of State, is something that was not contemplated or canvassed at the inquiry. In the event of the notice being confirmed and the appellant being unable to reach agreement with the local planning authority and having, therefore, to accept the Secretary of State's final determination of a scheme for restoration, he submits, he would be prejudiced by being unable to pursue any further appeal in the matter.

I should say that it is contended that, since the site on which these vehicles are undoubtedly and admittedly parked has been consolidated with an undetermined quantity of hardcore, it would be expensive and onerous to require the removal of such hardcore, and that would be a matter that would be likely to be the subject of any scheme to be agreed between the planning authority and the appellant.

At the inquiry, there was some reference to topsoil, but the matter was not pursued in any detail. The inspector had no evidence as to, and was unable from inspection to determine, the quantity of hardcore that had in fact been deposited on the site or the depth to which the site had been filled.

So far as that point is concerned, section 88(5) of the Town and Country Planning Act 1971 provides: " On the determination of an appeal under this section,"—that is, an appeal against an enforcement notice—" the Secretary of State shall give directions for giving effect to his determination, including, where appropriate, directions for quashing the enforcement notice or for varying the terms of the notice in favour of the appellant; . . ."

It is a provision that is quite plainly specified to operate in favour of the appellant. It is contended for the Secretary of State that this variation—that is to say, the provision that a scheme for restoration should be agreed with the local planning authority and that in default thereof such a scheme shall be determined by the Secretary of State—is a variation that is intended to and would be expected to operate in favour of the appellant. It would give the appellant, and, indeed, the planning authority, the opportunity to consider in detail what was required, with ultimate recourse to the Secretary of State in the event of disagreement. There could, of course, be no question of any failure to comply with the enforcement notice until and unless the Secretary of State had finally made a determination and that had not been complied with.

For my part, I accept the Secretary of State's contentions in this matter. I do not consider that this is a variation that is outside his powers, and, furthermore, I am quite satisfied that it is a variation

that should be construed, on the facts, as being in favour of the appellant. In my judgment, it was properly made.

The second point that was taken on behalf of the appellant was put forward as being of greater substance. Mr. Jones submits that in this particular case the alleged breach of planning control was that of making a material change of use of the land to use for the purpose of parking heavy goods vehicles in connection with a haulage business. The enforcement notice, he says, was not directed to the carrying out without planning permission of any building, engineering, mining or other operations in, on, over or under land. If such a breach of planning control were to be alleged, it would be one falling within section 87(3)(*a*),[4] and in such a case enforcement proceedings could only be taken in respect of development taking place within a period of four years preceding the service of the notice.

This enforcement notice was served on July 5, 1977. The appellant contends that, if there is development that should properly be considered as building, engineering, mining or other operations in, on, over or under land, there would be, as it were, a four-year limitation period that would exclude any earlier breach of planning control. He contends that the placing of the hardcore on this site is an operation that would come within the terms of section 87(3)(*a*) and would, consequently, attract the " limitation period " of four years. Therefore, hardcore placed on the site more than four years before the service of an enforcement notice would be exempt from any requirement for its removal.

The appellant claims that the planning authority ought not to be able to make any requirement for the restoration of the condition of the land by the removal of the hardcore, as distinct from the removal of the vehicles, because they have not served an enforcement notice relating to the carrying out without planning permission of an operation falling within section 87(3) and the placing of the hardcore on the site is such an operation. Mr. Jones contends that it would require the service of a separate notice, or, at any rate, a notice that specified that as a distinct and separate form of development. Since that has not been done, he claims that the enforcement notice that in fact has been served in this case cannot properly require the removal of the hardcore and, therefore, it is vitiated and ought to be referred to the Secretary of State for his consideration as to what course to adopt.

On behalf of the Secretary of State, it is urged that the placing of the hardcore is simply part and parcel of the use of this land for the parking of heavy goods vehicles in connection with the haulage business. The appellant agrees that the only purpose of the hardcore on the site is to enable it to be used for the purpose of parking of heavy goods vehicles. The Secretary of State submits that it is so much an integral part of the use of the site for the parking of heavy goods

[4] See note 1, *ante*.

vehicles that it cannot, and should not, be considered separately and that, when the enforcement notice makes the requirement for the discontinuance of the use complained of and requires the restoration of the land to its condition before the development took place, it ought to be understood to refer to the removal of the hardcore and properly includes that as a requirement.

Section 87(6)(*b*) of the Act of 1971 requires that an enforcement notice shall specify, first, the matters alleged to constitute a breach of planning control, and, secondly, the steps required by the authority to be taken in order to remedy the breach—that is to say, steps for restoring the land to its condition before the development took place. This is, of course, a mandatory duty that is placed on a local authority, and it would make a nonsense of planning control, in my judgment, if it were to be considered in the instant case that an enforcement notice requiring discontinuance of the use of the site in question for the parking of heavy goods vehicles should not also require the restoration of the land, as a physical matter, to its previous condition, that requirement, of necessity, being the removal of the hardcore.

I do not accept the criticism made by the appellant that the requirement to restore the land to its condition before the development took place by the removal of the hardcore is one that is *ultra vires*. I am satisfied that the enforcement notice was a valid enforcement notice and that the decision of the Secretary of State, through his inspector acting under the referred procedure, was one that was properly made on the facts that he found.

For those reasons, I would dismiss this appeal.

Waller L.J. I agree. I would add a word or two out of respect for Mr. Jones's argument.

His first submission, that the amendment made to the enforcement notice rendered it invalid because it deprived, he submitted, the appellant of any right of appeal overlooks the fact that the Secretary of State, on the question of fact, would be the final court. What the Secretary of State finds as facts are not appealable, because the only appeal that there can be to this court is on points of law.

Secondly, in my judgment, the provisions of section 88(5) make it clear that the amendment that was made was something that was in favour of the appellant; if it had not been, it was one that could not have been made. If, as it clearly was, it was in favour of the appellant, it was simply following the provisions of section 88(5), which gives the Secretary of State power to give directions for giving effect to his determination, including directions for quashing the enforcement notice or for varying its terms in favour of the appellant, so that the final result was clearly one that was for the benefit of the appellant.

The second submission made by Mr. Jones was this. He submitted that laying down this hardcore was an operation similar to building, engineering or mining, as specified in section 87(3). Therefore, he submitted, it could only be subject to an enforcement notice

if the notice was served within four years of the breach, and in this case, although there is no specific finding about it, the laying down of this hardcore took place some time before four years before the date of the notice.

There is [no] direct authority on the submission made by Mr. Jones. Mr. Brown has drawn our attention to the practice of the Secretary of State where residential premises are concerned, where an order is commonly made saying that the multiplicity of tenants must be stopped and that the [house] must be restored to the condition in which it was before multiple tenancies were created. Mr. Brown knew of no authority that had said that such an order was wrong. On the other hand, he frankly admitted that there was no authority that specifically applied to a case such as the present.

The conflict is really between two different subsections of section 87. Section 87(6) gives specific authority for a notice in matters of this sort to specify the steps required to be taken in order to remedy the breach, that is to say, steps for the purpose of restoring the land to its condition before the development took place, and I see no reason to retract that meaning.

If one wishes to see some logic in the distinction between the two types of breach—that is, a breach where the variation has existed for four years or more and a breach where that which is described as a variation is something ancillary to the use—as it seems to me, the former case is one where something is done that, on the whole, would be obvious—that, on the whole, would be permanent by the mere fact that it is done and, therefore, something that should be dealt with within a period of four years, whereas in the second case, where it is [a question of] an ancillary purpose, the planning matter [*sic*] might leave land, as in this case, in a useless condition for any purpose, and, therefore, it is logical that, when the use that has no planning permission is enforced against, the land should be restored to the condition in which it was before that use started.

I agree that this appeal should be dismissed.

Appeal dismissed with costs.

Solicitors—Malkin, Cullis & Sumption for S. J. Green & Partners, Cambridge; Treasury Solicitor.

[*Reported by Michael Gardner, Barrister.*]

Appendix J

Secretary of State for Levelling-up, Housing and Communities v Caldwell [2024] EWCA Civ 467

Neutral Citation Number: [2024] EWCA Civ 467

Case No: CA-2023-001916

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
PLANNING COURT
Mrs Justice Lieven
[2023] EWHC 2053 (Admin)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 2 May 2024

Before:

SIR KEITH LINDBLOM
(Senior President of Tribunals)
LORD JUSTICE COULSON
and
LADY JUSTICE ANDREWS

- -

Between:

SECRETARY OF STATE FOR LEVELLING UP, HOUSING AND COMMUNITIES	**Appellant**
- and -	
(1) IAN NIVISON CALDWELL **(2) TIMBERSTORE LIMITED**	**Respondents**

- -
- -

Zack Simons and Nick Grant (instructed by the **Government Legal Department**) for the **Appellant**
Douglas Edwards K.C. and Michael Rhimes (instructed by **Goodenough Ring Solicitors**) for the **Respondents**

Hearing date: 13 March 2024

- -

Approved Judgment

This judgment was handed down remotely at 4.40pm on 2 May 2024 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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The Senior President of Tribunals:

Introduction

1. Did an inspector who determined an appeal against an enforcement notice issued under section 172 of the Town and Country Planning Act 1990 ("the 1990 Act"), which required the cessation of residential use on land and the demolition of a bungalow built upon it, misapply the principle in *Murfitt v Secretary of State for the Environment* [1980] 40 P. & C.R. 254? That is the basic question to be decided in this case.

2. With permission granted by Singh L.J., the appellant, the Secretary of State for Levelling Up, Housing and Communities, appeals against the order of Lieven J. dated 13 September 2023, quashing an inspector's decision, in a decision letter dated 14 February 2023, to dismiss an appeal by the first respondent, Ian Caldwell, under section 174 of the 1990 Act and to uphold, with corrections and variations, an enforcement notice issued by Buckinghamshire Council in February 2021 against an alleged breach of planning control on land in the Metropolitan Green Belt, close to the junction of Pyebush Lane and the A40 at Beaconsfield. The enforcement notice required both the cessation of residential use and the demolition of a bungalow known as "The Goose House", which had been built without planning permission in 2013 and 2014. The council has played no part in these proceedings, either in this court or below.

3. The inspector also dismissed an appeal under section 195 of the 1990 Act by the second respondent, Timberstore Ltd., against the council's refusal of an application under section 191(1)(a) and (b) for a certificate of lawful use or development for the change of use of the land to residential use, and an appeal by Mr Caldwell under section 195 against its failure to determine an application for a certificate of lawful use or development under section 191(1)(b) for the retention of "The Goose House".

4. Mr Caldwell had applied several times between 1996 and 2012 for planning permission to build various structures on the site, including a dwelling, without success. Building work began in November 2013 and was completed in March 2014. "Concealment" of the works was not an issue raised before the inspector. The council had evidently been made aware that a building was being erected on the site when it received a complaint in January 2014, about seven years before it eventually issued the enforcement notice in February 2021. As well as "The Goose House", Mr Caldwell erected a feed store, a storage shed, a chicken coop and a "utility enclosure". In his decision letter (at paragraph 8) the inspector described "The Goose House" as "a single storey brick-built dwellinghouse with small front, rear and side gardens enclosed by low walls and fences …".

5. In March 2023, Mr Caldwell appealed under section 289 of the 1990 Act against the inspector's decision to uphold the enforcement notice, and also made an application under section 288 for an order to quash the decision to dismiss his section 195 appeal. Lieven J. allowed both the appeal and the application.

The main issues in the appeal

6. Two main issues arise in the appeal. The first is the same issue as that identified by Lieven J. in her judgment (at paragraph 2), namely "whether the [inspector] erred in law in relation to the scope of the power to require the removal of operational development pursuant to the power in section 173(4)(a) [of the 1990 Act], as explained by the Divisional Court in [*Murfitt*]". The second is raised in the respondent's notice: whether the inspector's application of the *Murfitt* principle in this case was irrational.

The statutory provisions

7. Section 55(1) of the 1990 Act identifies two types of development: "the carrying out of building, engineering, mining or other operations in, on, over or under land" and "the making of any material change in the use of any buildings or other land".

8. Under section 171A(1)(a) "carrying out development without the required planning permission" constitutes "a breach of planning control".

9. Time limits on enforcement are set by section 171B, which at the relevant time provided:

> "(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.
>
> (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
>
> …
>
> (3) 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.
>
> …".

10. Under section 172, the local planning authority may issue an enforcement notice where it appears to it that there has been a breach of planning control and it is expedient to do so.

11. Section 173 provides:

> "(1) An enforcement notice shall state –

> (a) the matters which appear to the local planning authority to constitute the breach of planning control … .
>
> …
>
> …
>
> (3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
>
> (4) Those purposes are –
>
> (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place;
>
> …
>
> (5) An enforcement notice may, for example, require –
>
> (a) the alteration or removal of any building or works …
>
> …
>
> …".

12. Section 174(2) sets out seven grounds on which an appeal against an enforcement notice may be made, grounds (a) to (g). Ground (d) is:

> "(d) that, at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control which may be constituted by those matters".

13. Section 191(1) provides that any person may apply for a "certificate of lawfulness" to ascertain whether any existing use of buildings or other land (section 191(1)(a)) or any operations which have been carried out (section 191(1)(b)) are lawful.

14. Section 115 of the Levelling-up and Regeneration Act 2023 ("the 2023 Act"), which came into force on 25 April 2024, amends section 171B of the 1990 Act to provide that for both operational development and material changes of use the time limit for the taking of enforcement action is to be ten years. Transitional arrangements are made by regulation 5 of the Planning Act (Commencement No.8) and Levelling-up and Regeneration Act 2023 (Commencement No.4 and Transitional Provisions) Regulations 2024, which provides that these amendments do not apply where "(a) in respect of a breach of planning control referred to in section 171B(1) of the 1990 Act … , the operations were substantially completed" or "(b) in respect of a breach of

planning control referred to in section 171B(2) … , the breach occurred" before 25 April 2024. The parties therefore agree that the coming into force of these provisions does not affect the outcome of this appeal.

Relevant case law

15. The principle stated in *Murfitt* is well established. The relevant case law was considered in *Kestrel Hydro v Secretary of State for Communities and Local Government* [2023] P.T.S.R. 2090 (in paragraphs 23 to 34 of my judgment).

16. In *Murfitt,* the Divisional Court recognised that local planning authorities, when enforcing against a material change of use under section 87 of the Town and Country Planning Act 1971 ("the 1971 Act"), could require the removal of operational development connected to the change of use "for the purpose of restoring the land to its condition before the development took place" (section 87(6)(b) of the 1971 Act, now section 173(4)(a) of the 1990 Act). The local planning authority had issued an enforcement notice alleging a material change of use of agricultural land for the parking of heavy goods vehicles belonging to a haulage business. The enforcement notice required the use to be discontinued and the land restored to its condition before the development had taken place, including the removal of hardcore laid on the site. An inspector upheld the notice. In his challenge to that decision Mr Murfitt maintained that the notice enforced only against the change of use, not against any operational development.

17. The first judgment was given by Stephen Brown J.. He said (at p.259):

> "Section 87(6)(b) of [the 1971 Act] requires that an enforcement notice shall specify, first, the matters alleged to constitute a breach of planning control, and, secondly, the steps required by the authority to be taken in order to remedy the breach – that is to say, steps for restoring the land to its condition before the development took place. This is, of course, a mandatory duty that is placed on a local authority, and it would make a nonsense of planning control, in my judgment, if it were to be considered in the instant case that an enforcement notice requiring discontinuance of the use of the site in question for the parking of heavy goods vehicles should not also require the restoration of the land, as a physical matter, to its previous condition, that requirement, of necessity, being the removal of the hardcore."

18. Waller L.J., agreeing, is reported as having said this (at p.260):

> "The conflict is really between two different subsections of section 87. Section 87(6) gives specific authority for a notice in matters of this sort to specify the steps required to be taken in order to remedy the breach, that is to say, steps for the purpose of restoring the land to its condition before the development took place, and I see no reason to retract that meaning.

> If one wishes to see some logic in the distinction between the two types of breach – that is, a breach where the variation has existed for four years or more and a breach where that which is described as a variation is something ancillary to the use – as it seems to me, the former case is one where something is done that, on the whole, would be obvious – that, on the whole, would be permanent by the mere fact that it is done and, therefore, something that should be dealt with within a period of four years, whereas in the second case, where it is [a question of] an ancillary purpose, the planning matter [*sic*] might leave land, as in this case, in a useless condition for any purpose, and, therefore, it is logical that, when the use that has no planning permission is enforced against, the land should be restored to the condition in which it was before that use started." (emphasis added)

19. This approach has consistently been followed at first instance. In *Perkins v Secretary of State for the Environment and Rother District Council* [1981] J.P.L. 755, Glidewell J., as he then was, dismissed an appeal against an inspector's decision upholding an enforcement notice against a change of use, which required the removal of various machinery, piles of rubble, heaps of soil and battery cases. He accepted (at p.756) that "… [*Murfitt*] was binding authority for the proposition that section 87(6) of the Act permitted an enforcement notice to be served where the operational development was an integral part of the change of use". In *Somak Travel Ltd. v Secretary of State for the Environment* (1988) 55 P. & C.R. 250, Stuart-Smith J. dismissed an appeal against an inspector's decision upholding an enforcement notice against a material change of use by the conversion of a maisonette above a ground-floor office into office space, requiring the removal of a spiral staircase installed to connect the ground floor with the first floor. He said (at p.256) that "[the] test laid down in that case by Stephen Brown [J.], that the operational activity should be part and parcel of the material change of use or integral to it" was satisfied. This, he added, "must, of course, be a question of fact in each case …". He went on to say (at p.257) that "[adopting] the integral and part and parcel test, which [counsel for the company] accepts is the correct test laid down in *Murfitt*, it seems to me that there was abundant material on which the inspector could come to the conclusion that it was part and parcel of it and integral to it". In *Shephard and Love v Secretary of State for the Environment and Ashford Borough Council* [1992] J.P.L. 827, Sir Graham Eyre Q.C., sitting as a deputy judge of the High Court, upheld an inspector's decision dismissing an appeal against an enforcement notice in which the appellant had challenged a requirement in the notice to remove huts associated with a material change of use of land to a "leisure plot".

20. The narrowness of the *Murfitt* principle is well illustrated in *Newbury District Council v Secretary of State for the Environment* [1995] J.P.L. 329, where Mr Roy Vandermeer Q.C., sitting as a deputy judge of the High Court, concluded that it did not apply to the requirement to remove a tennis court in an enforcement notice against the unauthorised change of use of an agricultural field to a residential garden. The deputy judge had "considerable doubt" that *Murfitt* could be interpreted "to effectively set aside the provisions of section 171B(1)" (p.335). In his view, the "clearest statement of principle" was to be seen in Waller L.J.'s formulation of the question as "being whether the act of construction or building operation is simply ancillary", and his reference to "issues such as the extent and degree of the development". He went on to say (at pp. 335 and 336):

> "What seemed to emerge … is that it is proper, when looking at a building operation or the construction of a building, for the question to be asked as to whether it is simply ancillary to the change of use. … [It] is a matter depending upon facts, and is therefore essentially a matter of fact and degree. It is for the decision maker to look at the position.
>
> Where what is built is substantial, obviously seen it is unlikely … that one could come to the conclusion that it should lose the protection of section 171B because it involved also a change of use. When it was something as modest as putting hardcore in the land which, as Waller LJ pointed out, could really not be seen externally and rendered the land useless, then it is clear that one can treat it as a step on the way to the change of use and not as a separate development in its own right. It would not, therefore, achieve the support and comfort of the four-year rule."

21. Twice in this court the principle has been acknowledged. In *Welwyn Hatfield Borough Council v Secretary of State for Communities and Local Government* [2010] P.T.S.R. 1296, the landowner had permission to build a barn, but in fact built a dwelling house disguised as a barn. Richards L.J. said:

> "30. If, as I have found, the situation falls within section 171B(2), the council's reliance on section 171B(3) must fail. The plain legislative intention is that, once the four year time limit is found to apply, it displaces the ten year time limit even if the situation could be analysed by another route as one to which the longer time limit also applied … ."

22. The local planning authority argued that the *Murfitt* principle would allow the enforcement notice to require the demolition of the barn. Richards L.J. addressed this point incidentally:

> "32. I am very doubtful about that elaboration of the council's argument. *Murfitt* was a very different case … . In rejecting a submission that the placing of the hardcore was operational development immune from enforcement action by reason of the four year time limit, the [court] plainly accepted that the hardcore was so integral to the use of the site for the parking of vehicles that it could not be considered separately from the use, or that it was properly to be regarded as ancillary to the use being enforced against. I do not think that similar reasoning can be applied to the building in question here, and I would be reluctant in any event to accept that an enforcement notice directed against use of the land could properly require removal of a building that enjoys an immunity from enforcement by virtue of section 171B(1). But it is unnecessary for me to say anything more on the point, both because of my finding that the council's basic case under section 171B(3) must fail and because Mr Beglan made clear that the council would wish to enforce against the residential use of the building even if it could not secure removal of the building itself." (emphasis added)

23. Although the Supreme Court overturned the decision of the Court of Appeal ([2011] 2 A.C. 304), the principle in *Murfitt* and the observations Richards L.J. had made about it were not mentioned in the leading judgment of Lord Mance (with whom Lord Phillips of Worth Matravers, Lord Walker of Gestingthorpe, Baroness Hale of Richmond, and Lord Clarke of Stone-cum-Ebony agreed). Lord Mance noted that the legislative scheme created a "basic distinction" in the time limits on enforcement, between operational development and change of use (paragraph 16). He said (in paragraph 17) that "[protection] from enforcement in respect of a building and its use are … potentially very different matters". After referring to the appellant's argument that if there was no change of use under section 171B(2) the barn itself would be immune from enforcement as operational development under the four-year limit in section 171B(1) while its use as a dwelling could still be enforced against under the ten-year limit in section 171B(3), he said:

> "17 … I agree that that would, on its face, seem surprising. However, it becomes less so, once one appreciates that an exactly parallel situation involving different time periods applies to the construction without permission and the use of a factory or any building other than a single dwelling house. The building attracts a four-year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten-year period for enforcement under subsection (3). I say in theory because there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four-year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless."

24. In *Kestrel Hydro* the alleged breach of planning control was the making of a material change of use, without the necessary planning permission, by the conversion of the premises from residential use to mixed use for residential purposes and as an "Adult Private Members' Club". The enforcement notice required the removal of various structures and a car park on the site, as well as the cessation of the change of use. Applying the principle in *Murfitt*, the inspector upheld it. The appellant argued that the principle was incompatible with the statutory scheme and that *Murfitt* had been wrongly decided. That argument was rejected by Holgate J. ([2015] EWHC 1654 (Admin)).

25. The appeal to this court failed. Endorsing the inspector's approach, I said:

> "23 … [The] decisions in *Murfitt* and *Somak Travel Ltd* are good law and support the course adopted by the council in this case. As I read those decisions, they do not purport in any way to modify the statutory scheme. They do not ignore the distinction between operational development and material changes of use, now in section 55(1) of the 1990 Act, or sanction any disregard of the time limits for enforcement now in section 171B, or enlarge the remedial provisions now in section 173(3) and (4). They represent the statutory scheme being lawfully applied, as in every case of planning enforcement it must be, to the particular facts and circumstances of the case in hand – which is what happened here.

> 24 As [counsel] submitted for the Secretary of State, it is necessary in every case to focus on the true nature of the breach of planning control against which the local planning authority has enforced. It is the nature of the breach that dictates the applicable time limit under section 171B. Under section 173(1) the enforcement notice must state the matters that appear to the local planning authority to "constitute the breach …". The nature of the alleged "breach" will also be evident in the requirements of the notice and in any appeal against it. The provisions of section 173(3) and (4) are directed to "remedying the breach", and include, as one means of achieving that purpose, "restoring the land to its condition before the breach took place". And the provisions for grounds of appeal in section 174 are framed in terms of the "breach" that is "constituted" by the matters that constitute the "breach"."

26. I went on to say:

> "26 This was one of those cases in which the change of use offending lawful planning control entailed the carrying out of physical works to enable and facilitate the unauthorised use of the land. Though some or all of those works comprised engineering or building operations, this in itself did not, as a matter of fact and degree, take the breach of planning control out of the ambit of section 171B(3) and into the scope of section 171B(1). In such a case, as one might expect, the remedy for the breach provided for under section 173(4)(a) can involve the removal of works carried out in association with the unlawful change of use.
>
> 27 The principle at work here is … unsurprising. And, contrary to [the appellant's counsel's] submission, the "juridical basis" for it is not obscure. It has been recognised in jurisprudence extending back at least to the Divisional Court's decision in *Murfitt* … , and has been constantly applied by the courts since that decision. It corresponds to the provision in section 173(4)(a) of the 1990 Act – previously section 87(6)(b) of the 1971 Act – which enables a local planning authority to issue an enforcement notice specifying steps to be taken to remedy the breach of planning control by "restoring the land to its condition before the breach took place". It does not, and cannot, distort the operation of the time limits in section 171B, or widen the reach of the requirements provided for in section 173(3) and (4) beyond the bounds set for them in those provisions. Of course, its breadth must not be over-stated. It operates within the statutory scheme, not as an extension of it.
>
> 28 What, then, is the principle? It is that an enforcement notice directed at a breach of planning control by the making of an unauthorised material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself – provided that the works concerned are integral to or part and parcel of the unauthorised use. … In every case in which it may potentially apply, therefore, it will generate questions of fact and degree for the decision-maker. Whether it does apply in a particular case will depend on the particular circumstances of that case.

> …
>
> 30 The cases demonstrate that the principle acknowledged and applied in *Murfitt* … does not embrace operational development of a nature and scale exceeding that which is truly integral to a material change of use as the alleged breach of planning control. It seems clear that this is what Waller LJ had in mind when he used the word "ancillary" in the passage I have cited from his judgment in *Murfitt* (at p 260). This is not to refine the principle or to recast it. It is to recognise two things about it: first, that it is, in truth, a reflection of the remedial power, in section 173(4)(a), to require the restoration of the land to its condition before the breach of planning control took place; and secondly, that it does not – indeed, cannot – override the regime of different time limits for different types of development in section 171B(1), (2) and (3)."

The council's enforcement notice

27. The enforcement notice was issued by the council on 23 February 2021. The breach of planning control alleged in paragraph 3 of the notice, as subsequently amended by the inspector, was:

> "Without planning permission, the material change of use of the Land from agricultural use to residential use, and the carrying out of operational development to facilitate the aforesaid unauthorised material change of use comprising of the construction on the Land of a building occupied as a dwelling … and incidental structures … ."

28. The requirements of the notice, in paragraph 5, as amended, were:

> "5.1 Cease the residential use of the Land; and
>
> 5.2 Demolish or dismantle the building occupied as a dwelling …
>
> 5.3 With the exception of Utility Building E, demolish or dismantle the incidental structures … ."

The section 174 appeal

29. Mr Caldwell's appeal against the enforcement notice under section 174 was made on grounds (a), (b), (c), (d), (f), and (g) in section 174(2) of the 1990 Act. The relevant ground in these proceedings is ground (d).

The inspector's conclusions on the ground (d) appeal

30. The inspector dealt with the ground (d) appeal in paragraphs 15 to 22 of his decision letter. In paragraph 15 he acknowledged that "the Goose House and the utility/services cabinet … would, in their own right, be immune from enforcement by virtue of section 171B(1)", but added that "where there has been a material change of use of land, structures which may, viewed in isolation, have become immune from enforcement may nonetheless be required to be removed in order to restore the land to the condition it was in before the breach of planning control occurred". He identified the issue as being "whether, in the circumstances, [Goose House and the utility/services cabinet] can be required to be removed". He went on, in paragraphs 16 and 17, to consider the Court of Appeal's decision in *Kestrel Hydro*:

> "16. Both parties refer to the judgment in *Kestrel Hydro* as the most recent consideration of relevant case law, including that in *Murfitt, Somak Travel Ltd.*, [*Bowring v Secretary of State for Communities and Local Government* [2013] EWHC 1115 (Admin); [2013] J.P.L. 1417] and the Court of Appeal and Supreme Court decisions in *Welwyn Hatfield*. It sets out the principle that an enforcement notice directed at a breach of planning control by the making of an unauthorized material change of use may lawfully require the land or building in question to be restored to its condition before that change of use took place, by the removal of associated works as well as the cessation of the use itself, provided that the works concerned are integral to or part and parcel of the unauthorized use and are not works previously undertaken for some other lawful use of the land. It does not embrace operational development of a nature and scale exceeding that which is truly integral to the material change of use as the alleged breach of planning control, nor does it override the regime of different time limits for different types of development in section 171B.
>
> 17. *Kestrel Hydro* was concerned with development that was subsequent to the unauthorised material change of use enforced against. In this case it is argued that the operational development comprising the construction of the Goose House preceded the change of use of the land to residential use and that the erection of the dwelling was not merely incidental to, ancillary or supportive of the material change of use, rather it was operational development in its own right. While the operational development must undoubtedly be supportive of the change of use, I find nothing in the cases cited to indicate that the development must necessarily be capable of being described as ancillary or incidental, having regard to the qualification in *Kestrel Hydro* of the use of the word 'ancillary' in *Murfitt*, it is sufficient that it is part and parcel of, and integral to the change of use. Neither is it the case that works carried out before the change of use was clearly effected, as appears to have been the case in *Somak Travel Ltd* and *Bowring*, and possibly *Murfitt*, could not be integral and part and parcel of the change."

31. Having stated that understanding of the authorities, the inspector applied it in this way, in paragraphs 18 to 20:

> "18. In the circumstances I consider that the operational development and the making of the material change of use should not be viewed as entirely separate developments. Mr Caldwell's evidence is that the purpose of erecting the building was, from the outset, to provide a dwelling as more suitable accommodation for one of his employees who might otherwise leave, and whose presence would ensure security of the site. The construction of the Goose House was clearly for the purposes of making a material change of use of the land to use for residential purposes, and it was integral to, and part and parcel of, that change. The operational development comprised in the erection of the dwelling, a modest single storey building, was not of a nature and scale that would take it beyond what could be considered to be integral to the material change of use.
>
> 19. I consider, in the particular circumstances of this case, that the principal form of development was the making of the material change of use of the land, and that the construction of the building can reasonably be regarded as associated works. Since the purpose of the notice is clearly to remedy the breach of planning control by returning the land to the condition it was in before the breach took place, it is not excessive to require the removal of the building.
>
> 20. In coming to this view I have noted the doubt expressed by Richards L.J. in *Welwyn Hatfield* … that an enforcement notice directed to a material change of use could require the removal of the building itself in that case, but that was not a point that he ultimately had to decide. Nor do I consider that the fact that the Council was aware of the building while it was being erected, describing it as a "brick outbuilding", precludes it from taking enforcement action subsequently against the material change of use of the land which it was integral to, and part and parcel of, and requiring its removal."

32. His conclusion, in paragraph 21, was this:

> "21. Overall, I find that the requirement to demolish the building does not exceed what is necessary to remedy the breach, and that it is a requirement that the Council could properly impose under section 173(4)(a) of the 1990 Act."

The judgment in the court below

33. Lieven J. concluded that the inspector had erred in law. While section 173(3) and (4) allowed a local planning authority to require the restoration of land to its condition before the breach of planning control, section 171B gave operational development, including the erection of dwelling houses, immunity from enforcement action four years after substantial completion (paragraph 32 of the judgment). The case law clearly established that the power to require restoration could include the removal of operational development that could not be enforced against on its own because of section 171B (paragraph 33). But the *Murfitt* principle, said the judge, "is subject to limitations" and "cannot override or extend the statutory scheme" (paragraph 34). She continued (in paragraph 35):

> "35. It is helpful to consider the factual context of the various cases where [*Murfitt*] has been applied. In all those cases, including [*Kestrel Hydro*] itself, the works have been secondary, ancillary or "associated with" the change of use. They have not been fundamental to or causative of the change of use. One can use a variety of different words to describe this relationship, and various judges have described it in different ways, but the list above … makes the point very clearly. Lindblom [L.J.] in [*Kestrel Hydro*] comes close to describe the concept at [34] where he refers to the change of use entailing subsequent "physical works to facilitate and support it". I do not think the works have to be "subsequent", that will depend on the facts of the case, but they are facilitative only."

34. The judge also relied (in paragraphs 36 to 38) on Richards L.J.'s observations in paragraph 32 of his judgment in *Welwyn Hatfield Borough Council* and those of Lord Mance in paragraph 17 of his judgment in the same case. Lord Mance had drawn a clear distinction between the four-year limitation for enforcement against the construction of a building and the ten-year limitation for enforcement against a material change of use. In *Kestrel Hydro* the Court of Appeal had held that this distinction did not undermine the *Murfitt* principle (paragraph 38). The judge therefore concluded (in paragraph 39):

> "39. In my view both the statute itself and the caselaw point to a limitation on the power described in [*Murfitt*], where the operational development is itself the source of or fundamental to the change of use. Whether that limitation is reached is a matter of fact and degree. However, the Inspector here erred in not appreciating that there was such a limitation, and that to require the removal of the dwelling house, was clearly going beyond the statutory power."

The first issue – did the inspector misdirect himself on the scope of the power under section 173(4)(a)?

35. For the Secretary of State, Mr Zack Simons argued that the decisive question here, following the Court of Appeal's reasoning in *Kestrel Hydro*, is whether the inspector was entitled to find that the construction of "The Goose House" was "part and parcel" of the unlawful change of use. The *Murfitt* principle, he submitted, is subject to two restrictions: first, that the relevant operational development cannot exceed the nature and scale of that which is truly "integral to or part and parcel of" the material change of use, and second, that an enforcement notice cannot require the removal of works previously undertaken for a lawful use of the land and capable of being employed for that or some other lawful use once the unlawful use has ceased. Only the first of those two restrictions was relevant here. The restriction identified by the judge had no basis in the authorities, and would lead to the creation of "useless" buildings and the associated planning harm. In this case, Mr Simons submitted, the breach of planning control that the council's enforcement action sought to redress was the material change of use, and the purpose of the enforcement notice was to restore the site to the state it was in before that change of use occurred. In the exercise of his planning judgment on the facts as he found them to be, the inspector concluded that "The Goose House" was integral to, or "part and parcel" of, the unauthorised use. That conclusion was lawful. It was true to the *Murfitt* principle. And it was not *Wednesbury* unreasonable.

36. For Mr Caldwell, Mr Douglas Edwards K.C. relied on the judge's reasons. He submitted that an overly expansive application of the *Murfitt* principle would disrupt the legislative distinction in the different periods for enforcing against operational development and material changes of use. The importance of this distinction had been recognised in *Welwyn Hatfield Borough Council* (in paragraph 16 of Lord Mance's judgment in the Supreme Court and paragraph 26 of Richards L.J.'s judgment in the Court of Appeal), and in *Kestrel Hydro* (at paragraphs 23, 27 and 30). The principle does not allow for the removal of operational development "fundamental to or causative of the change of use". Mr Edwards emphasised Waller L.J.'s use of the word "ancillary" in describing operational development caught by the *Murfitt* principle, Richards L.J.'s obiter dicta in *Welwyn Hatfield Borough Council* and the reasoning of the deputy judge in *Newbury District Council*. He also pointed to the use of the word "entailed" in *Kestrel Hydro* (at paragraphs 26 and 34). The use of the site for residential purposes, he argued, did not "entail" or "result in" the construction of "The Goose House". Both "temporally and functionally", the residential use had followed from the erection of that building. The inspector had misunderstood the scope of the *Murfitt* principle, which is limited by the parameters set by the statutory scheme. The decision in *Kestrel Hydro* did not reduce that principle merely to a matter of planning judgment.

37. I cannot accept Mr Simons' argument, elegantly as it was presented. I think Mr Edwards' submissions are basically correct. In my view the judge's reasoning was sound. She understood the principle in *Murfitt*, and its limits. Her observation, in paragraph 39 of her judgment, that the legislation and the relevant authorities indicate a "limitation on the power described in [*Murfitt*], where the operational development is itself the source of or fundamental to the change of use" captured the essential point. And her conclusion that the inspector "erred in not appreciating that there was such a limitation, and that to require the removal of the dwelling house … was clearly going beyond the statutory power" was also correct.

38. That an important principle was stated in *Murfitt* is not in dispute. Nor is it suggested that that principle has subsequently been mis-stated or misapplied in any of the cases to which I have referred. It is also agreed that the reasoning of the Court of Appeal in *Kestrel Hydro* is binding on us. Both parties relied on that reasoning. In my view, therefore, there is no need for us to revise the *Murfitt* principle itself, and it would be inappropriate to do so. The principle is familiar, and the limitations upon it are clear.

39. Five points emerge. First, as was emphasised in *Kestrel Hydro* (at paragraph 30), the *Murfitt* principle must not be over-stated. Crucially, it operates, as it must, within the bounds of the statutory scheme, which set different time limits for enforcement against unauthorised operational development and unauthorised material changes of use. As Lord Mance said in *Welwyn Hatfield Borough Council* (at paragraph 17), immunity from enforcement respectively for buildings and their uses are "potentially very different matters" (see also *Kestrel Hydro*, at paragraphs 23, 27 and 30). The *Murfitt* principle cannot override this "basic distinction" put in place by Parliament. As a judge-made principle, it can only exist within that framework, not outside it.

40. Secondly, the principle embodies the remedial power in section 173(4)(a) to require the restoration of the land to its condition before the breach of planning control took place. It reflects the substance of that remedial, or restorative, provision. It represents a practical means of remediating the unauthorised change of use. The decision in *Murfitt* recognises that the statutory power to require restoration of the land to its previous

condition can, in some circumstances, include the removal of operational development that could not be enforced against on its own because of the four-year time limit in section 171B. However, the principle does not extend to works that are more than merely ancillary or secondary and are instead fundamental to or causative of the change of use itself.

41. Thirdly, the language used in the authorities to convey the meaning and scope of the *Murfitt* principle is significant. It indicates the narrowness of the principle, and demonstrates the court's intent to confine it within the statutory scheme. Thus the relationship between the unauthorised change of use and the operational development generated by it has consistently been described in the cases in terms of the operational development being "ancillary to" the change of use (see the judgment of Waller L.J. in *Murfitt*, at p.260, the judgment of Richards L.J. in *Welwyn Hatfield Borough Council*, at paragraph 32, and the judgment of the deputy judge in *Newbury District Council*, at pp.335 to 337). The word "ancillary" recurs. Operational development carried out "in its own right", or "fundamental to or causative of" the change of use is not "ancillary" to that change of use. Other words and phrases have been used to express the idea of the operational development serving, or being subordinate or secondary to, the change of use. These include the phrase "part and parcel of the material change" (*Somak*, at p.256), and the words "integral" (*Somak*, at p.256; *Shephard and Love*, at p.831; *Newbury District Council*, at pp.333 to 334; the judgment of Richards L.J. in *Welwyn Hatfield Borough Council*, at paragraph 32; and *Kestrel Hydro*, at paragraphs 28 and 30), "associated" (*Kestrel Hydro*, at paragraph 28), and "entailed" (*Kestrel Hydro*, at paragraph 26). Whether these words are truly synonymous in this context, as Mr Edwards submitted, they all have the sense that the operational development envisaged by the *Murfitt* principle is, as the word "ancillary" implies, subordinate or secondary to the material change of use. I agree with Lieven J.'s description of the kind of works to which the principle has been applied as "secondary, ancillary or "associated with" the change of use", and "facilitative only" (paragraph 35 of her judgment). This explains what the principle does in practice, as the court has consistently held.

42. Fourthly, therefore, the *Murfitt* principle does not support the removal of a building or other operational development that is "a separate development in its own right", the concept referred to by the deputy judge when considering the tennis court in *Newbury District Council* (at p.336), or, as Lieven J. put it in her judgment in this case, works "fundamental to or causative of the change of use" (paragraph 35). Where the operational development has itself brought about the change of use, the *Murfitt* principle is not engaged. This was the basis for what Richards L.J. said in paragraph 32 of his judgment in *Welwyn Hatfield Borough Council*, acknowledging that the enforcement notice in *Murfitt* was "very different" from one that required the removal of a dwelling house, as in that case. Obiter as they were, his observations were not doubted by the Supreme Court in that case, or by this court in *Kestrel Hydro* (at paragraphs 32 to 34). In my view they were right. Bringing within the scope of the *Murfitt* principle operational development that has itself caused the material change of use would have gone against the statutory scheme, undermining the different time limits in section 171B, and compromising, if not removing altogether, the immunity of operational development from enforcement action after four years (section 171B(1)). What immunity would then remain for a building when a change of use had taken place as a consequence of its construction? It would presumably have remained open to the

local planning authority to take enforcement action against such buildings for a period of ten years. This would have negated the effect of section 171B(1).

43. And fifthly, this understanding of the *Murfitt* principle is not displaced by the submission that it would create "useless" buildings, beyond the reach of enforcement action. Under the different time limits in section 171B(1) and (3) it was inevitable that in some cases a building erected without planning permission would become immune from enforcement but the material change of use generated by the construction of the building would not, with the consequence that a "useless" building would remain after the change of use had been successfully enforced against (see the judgment of Lord Mance in *Welwyn Hatfield Borough Council*, at paragraphs 16 and 17, and my judgment in *Kestrel Hydro*, at paragraph 31, referring to the discussion of "Immunities" in chapter 7 of the Carnwath Report). In those circumstances, the local planning authority may have had to consider whether it was expedient to enforce against the material change of use even though it would have been lawful to retain the building itself. This would be a matter of judgment for the authority. It may have been that a grant of planning permission for a different use of the building, or even, with suitable conditions, the same use, would accord with relevant policy. Or it may have been, no doubt rarely, that requiring the removal of the building under section 102 of the 1990 Act, with the requisite payment of compensation, would have been the appropriate course to take.

44. Whether the *Murfitt* principle is engaged in a particular case will always be a matter of fact and degree. But the principle itself must not be lost. It is not enough to say that an inspector, when applying the principle, must undertake an evaluative judgment, subject only to *Wednesbury* review. That judgment must be exercised on a correct understanding of the principle itself. The parameters set by the statutory scheme must be kept in mind. Only then can the principle be lawfully applied.

45. In my view the elasticity for which Mr Simons contended in the *Murfitt* principle was incompatible with the distinction between operational development and change of use in the time limits for enforcement under section 171B. The construction, without planning permission, of a new dwelling house on an undeveloped site, as took place here, was operational development to which the four-year time limit under section 171B(1) applied, not the ten-year time limit for material changes of use under section 171B(3). Otherwise, section 171B(1) would have become obsolete, or largely so. Building a dwelling house on land previously undeveloped will, of course, be likely to result in a change of use of that land. But this does not mean that there was a ten-year time limit for enforcement against such operational development, when the statutory time limit for enforcing against unauthorised operational development was four years under section 171B(1). That was not the effect of the principle in *Murfitt*.

46. I therefore do not accept that the determining question for the court in this case is purely whether it was *Wednesbury* unreasonable for the inspector to find that the construction of "The Goose House" was "part and parcel" of the change of use. At the outset he had to direct himself appropriately on the meaning and scope of the principle in *Murfitt*. If he did not direct himself as he should, his decision on the ground (d) appeal was flawed by legal error.

47. That, in my view, is what happened here. The inspector did misdirect himself, and in doing so he made an error of law. Though he purported to follow the reasoning of this court in *Kestrel Hydro* and other relevant cases, he did not succeed in doing so. In

paragraph 15 of the decision letter he acknowledged that "The Goose House" and "building E", whose construction was completed more than four years before the enforcement notice was issued, would "in their own right" be immune from enforcement under section 171B(1) of the 1990 Act. He went on to consider whether the removal of these structures could nonetheless be required, to restore the land to its condition before the breach of planning control. In paragraph 16 he referred to some of the relevant authorities, including *Murfitt*, *Welwyn Hatfield Borough Council*, and *Kestrel Hydro*. And he acknowledged that they do not embrace operational development of a nature and scale exceeding what is truly integral to the material change of use as the alleged breach of planning control, nor override the regime of different time limits for different types of development in section 171B.

48. Having done that, however, he went on in paragraph 17 to recast the *Murfitt* principle to the concept of the operational development in question being "supportive" of the change of use. The penultimate sentence in that paragraph is not entirely easy to understand, but it seems clear that he discounted the concept of the operational development being "ancillary" or "incidental" to the material change of use. He said he found "nothing in the cases cited to indicate that the development must necessarily be capable of being described as ancillary or incidental". It was, he said, "sufficient that it is part and parcel of, and integral to the change of use", a proposition he thought was justified by the Court of Appeal's decision in *Kestrel Hydro*.

49. This understanding of the *Murfitt* principle was incorrect. The court has consistently held that, to come within the principle, the operational development in question must be "ancillary" or "incidental" to the change of use itself. The inspector also discounted the relevant observations of Richards L.J. in *Welwyn Hatfield Borough Council*, a case where the facts were perhaps closer to those of this case than any of the other authorities. This too, I think, was wrong. By putting aside the essential requirement of the *Murfitt* principle that the works must be "ancillary" or "incidental" to the change of use, the inspector effectively expanded the principle beyond its boundaries to a broad jurisdiction to pursue enforcement action within the ten-year time limit under section 171B(3) against operational development plainly falling under the four-year limit in section 171B(1). And his conclusions in paragraphs 18 to 21 clearly hinged on this misunderstanding of the principle in *Murfitt*.

50. Had the inspector understood the *Murfitt* principle as it has been recognised by the court, it is difficult to see how he could have concluded that the material change of use in this case was not, in reality, the consequence of, and caused by, the construction of "The Goose House" as "a separate development in its own right" (as it was put in *Newbury District Council*). He would, I think, have acknowledged that the facts here were materially different from those of *Kestrel Hydro*, and that the operational development involved in the erection of "The Goose House" was not merely "ancillary" or "incidental" to the material change of use, but, in the words of Lieven J., "fundamental to or causative of [that] change of use" (paragraph 35).

51. To conclude on this issue, the inspector did misdirect himself on the *Murfitt* principle and thus misapplied it. This was fatal to his decision on the ground (d) appeal, and enough for the section 289 appeal to succeed.

The second issue – was the inspector's decision irrational?

52. Given my conclusion on the first issue, there is no need to decide the second, which concerns the alternative argument that the inspector's conclusion was in any event irrational. There may be force in that argument, but I express no view upon it.

Conclusion

53. For the reasons I have given, I would dismiss the appeal.

Postscript

54. This judgment must be read bearing in mind the change to the statutory time limits for enforcement action in section 171B that has now been brought about by section 115 of the 2023 Act. Although different time limits for enforcement will continue to apply to breaches of planning control that occurred before 25 April 2024, this reform of the statutory scheme will clearly affect future cases where the facts are similar to these (see paragraph 14 above).

Lord Justice Coulson:

55. I agree.

Lady Justice Andrews:

56. I also agree.

Appendix K

Application Form, Decision Notice and Site Plan for P 22/2521/2

Planning Application 1

Charnwood BC
Planning & Technical Services
File.....
- 4 DEC 2000

00/2521/2

The accompanying notes are for your guidance in completing this form
(The numbers on the left relate to corresponding notes)

Ref'd to	Initials
Dir | AD | BC | DC | ED | ES | PC	

CS 47

1. **Applicant**

NAME APRES ESTATES LTD
ADDRESS C/O AGENT
TEL. NO

Agent

NAME COLLIERS CRE (FAO J Best)
ADDRESS Milner House, 14 Manchester Square, London W1U 3UP
TEL. NO 020 7344 6924

2. **Address/Location of application site**

SYSTON MILL, MILL LANE, SYSTON, LEICESTERSHIRE

3. **Site Area** APPROX. 0.65 ha/m²

4. **Does the applicant own or control any of the adjoining land?** (please identify on plans) YES/NO X

5. **Full Description of the proposal**

IMPROVEMENTS TO EXISTING INDUSTRIAL, WAREHOUSE AND OFFICE PREMISE AND FACILITIES (SEE ATTACHED PLANS / SCHEDULE FOR DETAILS).

6. **Type of application (tick only one box)**

a. Change of Use only	
b. New building/alteration, extensions or other works	X
c. Change of Use involving new build/alteration	
d. Outline application for new buildings (complete question 7)	
e. Reserved matters (state no. of outline permission)	
f. Renewal of temporary permission (state no. of previous consent)	
g. Alteration or removal of a condition (state planning permission ref. no.)	
(state condition no.)	

7. **Outline application only (please tick which matters are included for approval now)**

Siting	
Design	
Means of Access	
External appearance	
Landscaping	
None	

8. ***ACCESS:*** **Does the proposal involve:**

a new vehicular access? ..... NO

a new pedestrian access? ..... NO

an altered vehicular access? ..... NO

an altered pedestrian access? ..... NO

9. **Does the proposal affect any trees?** (please indicate on plans) ..... ~~YES~~/NO

10. **Does the proposal involve any demolition?** (please indicate on plans) ..... ~~YES~~/NO

11. **Describe either the existing use of the site, or (if vacant) the last use and date vacated**

PART EXISTING, PART VACANT INDUSTRIAL, STORAGE & OFFICE USES

12. ***DRAINAGE:***

a. **How will surface water be dealt with?** AS EXISTING

b. **How will foul sewage be dealt with?** AS EXISTING

13. **Please list all external materials to be used, stating make and type**

SEE ATTACHED PLANS & SCHEDULE

14. **Please list the drawings and plans submitted with this application, (4 sets of each are required)**

SEE ATTACHED SCHEDULE

15. **Does this development involve anything other than houses or house extensions?** ..... YES/~~NO~~ XX

If yes you should complete Planning Application 2

16. **Does this application relate to any dwelling in connection with agriculture?** ..... ~~XXX~~/NO

If yes you should complete Planning Application 3

17. **CERTIFICATE OF OWNERSHIP (Article 7)**

I certify that:

a. ~~**at the beginning of the period of 21 days ending with the date of this application, nobody except the applicant was the owner of any part of the land to which the application relates, and that:**~~

b. **none of the land to which the application relates constitutes or forms part of an agricultural holding.**

Signed Miss Conrad Ribblar Fisher **(Applicant/Agent)** **Date** 29-11-00

NOTE: "Owner" means a person having a freehold interest or a leasehold interest, the unexpired term of which is not less than 7 years.

SIGNATURE AND DATE

I wish to apply for planning permission for the development described in this application and accompanying plans and enclose the fee of £ 95 **(See Fees)**

Signed Miss Conrad Ribblar Fisher **(Applicant/Agent)** **Date** 29 November 2000

Planning Application 2

Additional information for most applications (other than for new houses or house extensions)
See Notes overleaf.

Charnwood BC
Planning & Technical Services
File
- 4 DEC 2000
Ref'd to | Initials
Dir | AD | BC | DC | ED | ES | PC |

00/2521/2

1. **What is the proposed main use(s) of the development?**

Industrial (please answer Q2) ..... YES

Warehouse/Storage ..... YES

Office ..... YES

Shopping ..... NO

Other (please specify) .....

2. **Industrial Development Only**

Please describe fully the operations and any machinery involved
TO BE CONFIRMED

3. **Does the proposal form part of a larger scheme?** YES/NO

If yes please give details .....

4. **Does the proposal relate to an existing use on the site or elsewhere?** YES/NO

If yes please describe relationship AS DETAILED IN ATTACHED LETTER

5. **Floorspace on the application site:**

	Existing		After Development	
Industrial		sq. m.		sq. m.
Warehouse/Storage		sq. m.		sq. m.
Office		sq. m.		sq. m.
Shopping		sq. m.		sq. m.
Other		sq. m.		sq. m.
TOTAL		sq. m.		sq. m.

6. a. **How many staff are employed on site at present?** .....

b. **How many staff will be employed in total after the development?** .....

7. **What arrangements will be made for parking and servicing?** (Please show on your Plan(s))

DETAILS IN ATTACHED LETTER

8. **How many vehicles (excluding employees cars) will visit the site during a normal working day?**

NOT KNOWN ..... Cars NOT KNOWN ..... Light vans NOT KNOWN ..... Lorries

9. **What are the proposed hours of use?** NOT SPECIFIED

10. **Does the proposal involve the use or storage of hazardous materials?** YES/NO

Details .....

11. **Have you provided any additional written information which forms part of your application?** YES/NO

NOTES TO HELP YOU FILL IN THE APPLICATION FORM

1. We are only interested in the main use involved and therefore in most cases only one box will be needed to be ticked. Tick more than one box if there is to be a multiple use of the site.

2. Please provide as much detail as possible about the processes and other activities that are likely to take place at the site.

3. The local authority will need to know whether this application relates to only one stage of a larger project. If planning permissions have been granted for earlier stages, please give details.

4. Is this an expansion of an existing operation, a new facility to serve an existing business elsewhere or is it to replace an existing operation elsewhere?

5. The figures given should be gross floorspace, (excluding circulation space and service areas, e.g. toilets). If change of use only is proposed, the totals for 'existing' and 'after development' should be the same.

6. This should include all staff who are based at this site including delivery personnel working directly for the company but excluding staff based with other companies or sites.

7. The arrangements for parking and servicing should be clearly shown on the plans submitted with your application. 'Servicing' includes loading areas and turning areas. Parking should include facilities for employees, visitors, disabled staff or visitors, large vehicles and bicycles. The Planning Department can provide information on the local authority's standards for parking. These facilities should be provided wholly within the site.

8. Please estimate the average number and type of vehicles visiting the site including those involved in deliveries.

9. The local authority may consider imposing conditions restricting the hours of use. You should therefore decide now what hours of use you think you may wish to use the site. If the application relates to an existing use on the site. please specify the existing hours of use and any proposed change.

10. Hazardous materials are defined by regulations set down by the Government and the current list is available at the Planning Office. It is important to provide details of the quantities.

11. You can, if you wish, submit additional information about your application including continuation sheets if there has been insufficient room on this form to give a full answer. It is important for the local authority to know whether you intend this additional information to form part of your application.

EXISTING SITE PLAN

All areas and dimensions are approximate and should be verified on site. Any discrepancies and errors should be reported to the Architect before any work is put in hand.
The use or reproduction of this drawing or any part thereof is strictly prohibited save with the written consent of Dragonfly.

00/2521/2

Charnwood BC
Planning & Technical Services
File.....
- 4 DEC 2000

Ref'd to	Initials

Dir | AD | BC | DC | ED | ES | PC

B
D
C
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F
A
STORE
CONCRETE
TANKS
HARDCORE ROAD
BANK
CONCRETE ROAD
GATES
PORTACABIN
BUILDING A
BUILDING B
BUILDING C
BUILDING D
BUILDING E
BUILDING 7
BUILDING 7A
BUILDING 8
BUILDING 9
BUILDING 10
BUILDING 11
BUILDING 16
BUILDING 17
BUILDING 18
BUILDING 20
BUILDING 22
BUILDING 25
BUILDING 26
EXISTING TARMAC AREA
WEIR AND FOOTBRIDGE
GRASS AREA
Building 24
PUMPING STATION
FIRST FLOOR BUILDING 17/ 22
BRIDGE
SHRUBS
HARDCORE PARKING AREA
FOOTBRIDGE
TRAILER CONTAINERS
FIRST FLOOR BUILDING 10
TEMPORARY EARTH BANKING BY OTHERS
EXISTING HOUSE
EXISTING STABLING

DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

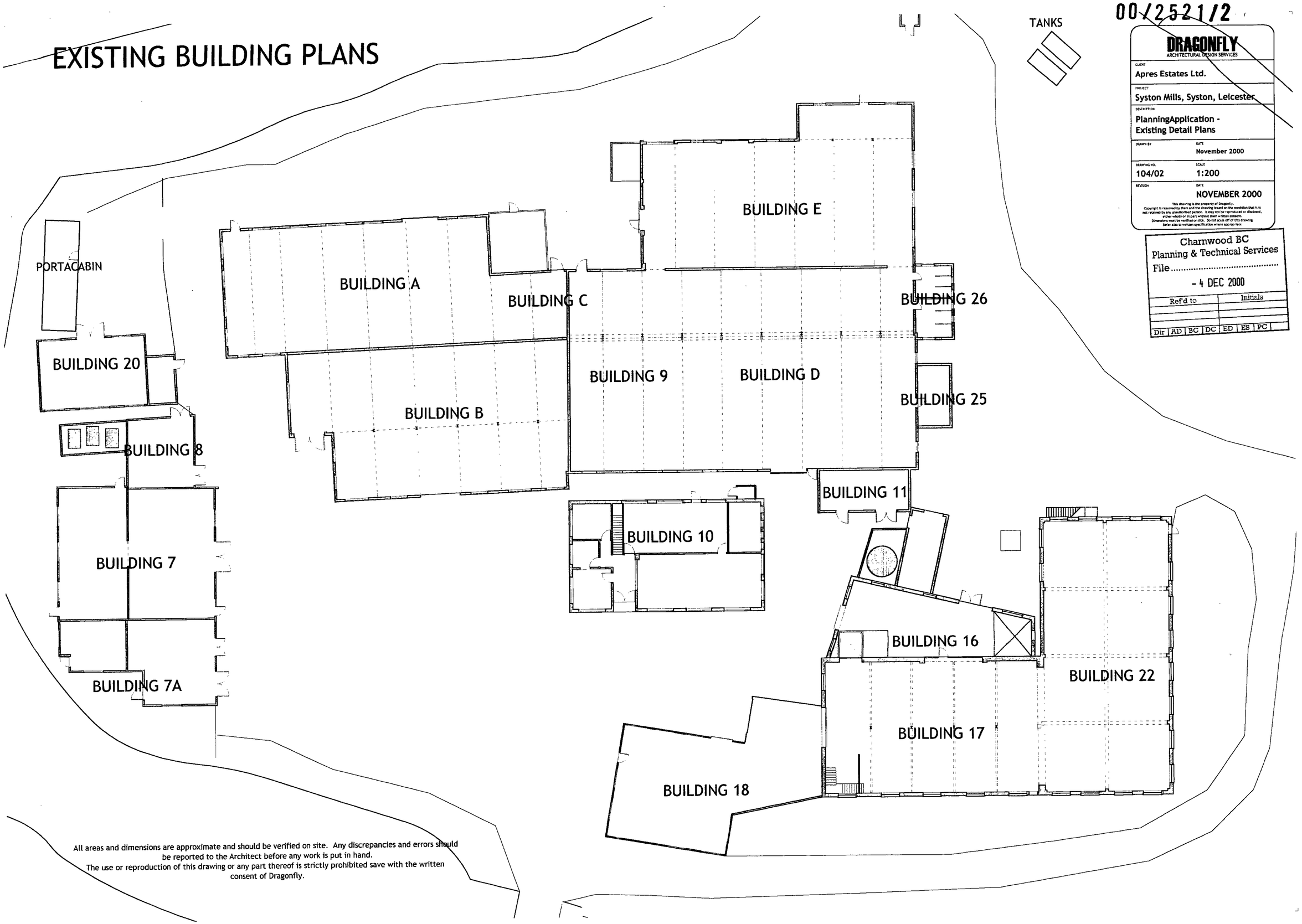
CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
PlanningApplication -
Site Plan

DRAWN BY	DATE
	November 2000
DRAWING NO.	SCALE
104/01	1:500
REVISION	DATE

EXISTING BUILDING PLANS



00/2521/2

DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT: Apres Estates Ltd.

PROJECT: Syston Mills, Syston, Leicester

DESCRIPTION: PlanningApplication - Existing Detail Plans

DRAWN BY	DATE
	November 2000
DRAWING NO. 104/02	SCALE 1:200
REVISION	DATE NOVEMBER 2000

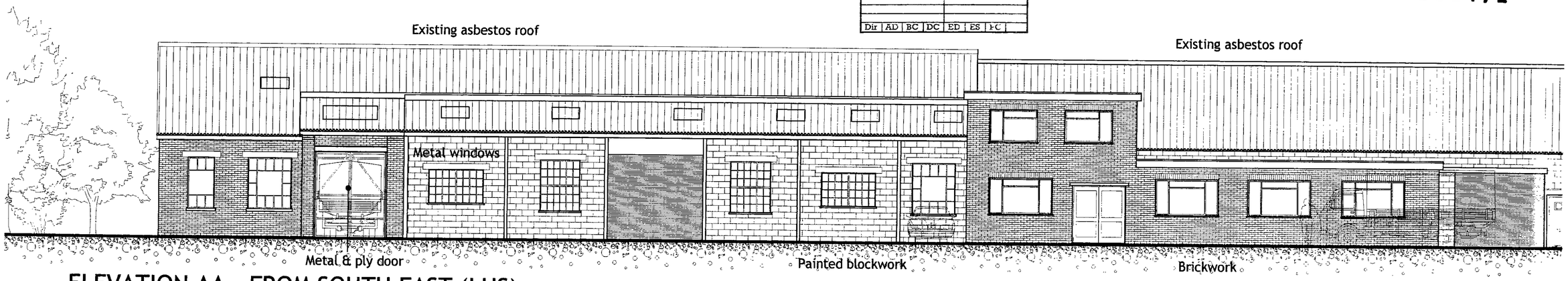
Charnwood BC
Planning & Technical Services
File.....
- 4 DEC 2000

Ref'd to	Initials

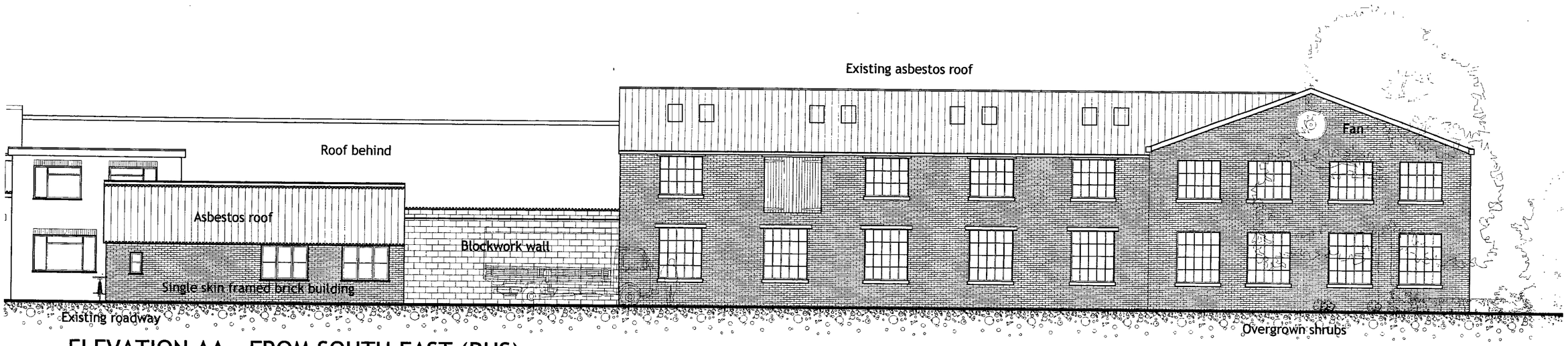
Dir | AD | BC | DC | ED | ES | PC

EXISTING ELEVATIONS

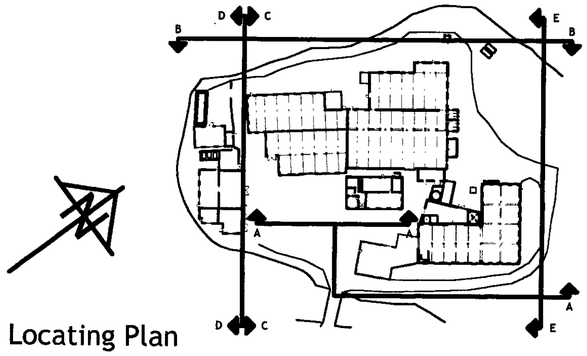
00/2521/2



ELEVATION AA - FROM SOUTH EAST (LHS)



ELEVATION AA - FROM SOUTH EAST (RHS)



Locating Plan

DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
Planning Application -
Existing Elevations

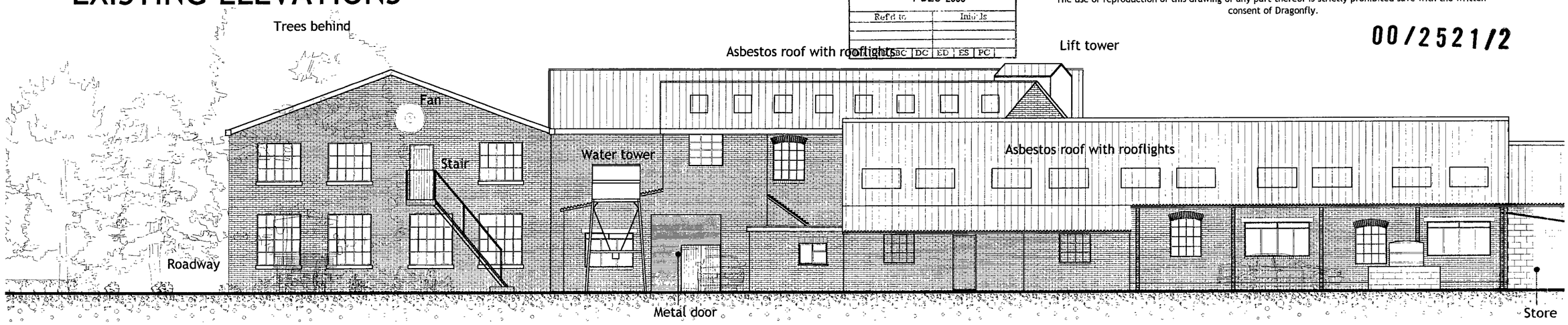
DRAWN BY | DATE
November 2000

DRAWING NO | SCALE
104/04 | 1:100

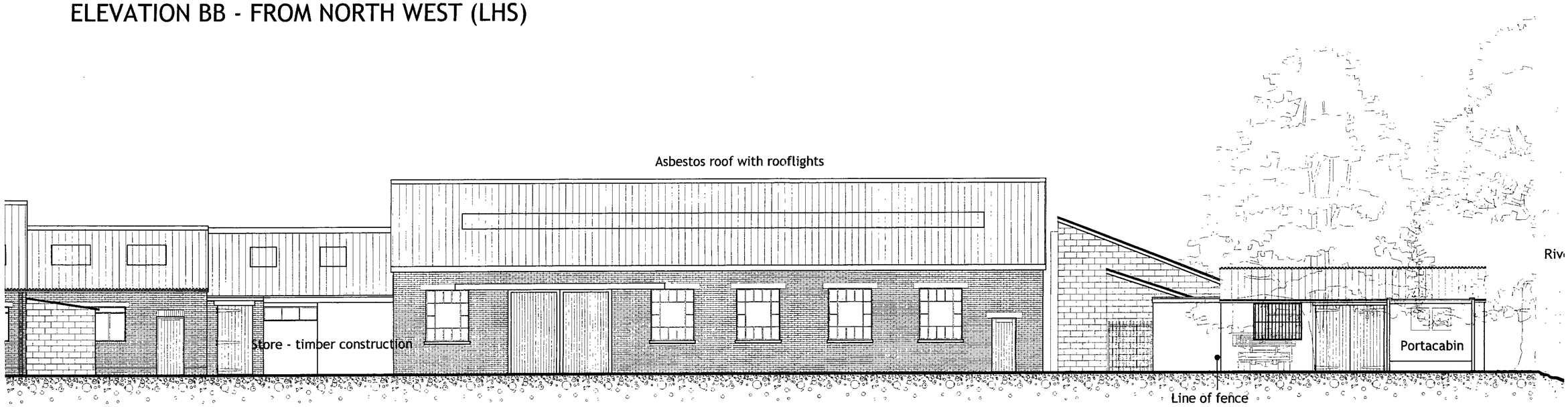
REVISION | DATE

EXISTING ELEVATIONS

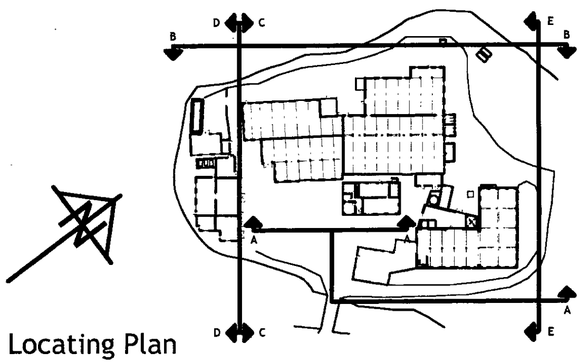
00/2521/2



ELEVATION BB - FROM NORTH WEST (LHS)



ELEVATION BB - FROM NORTH WEST (RHS)



Locating Plan

DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
Planning Application -
Existing Elevations

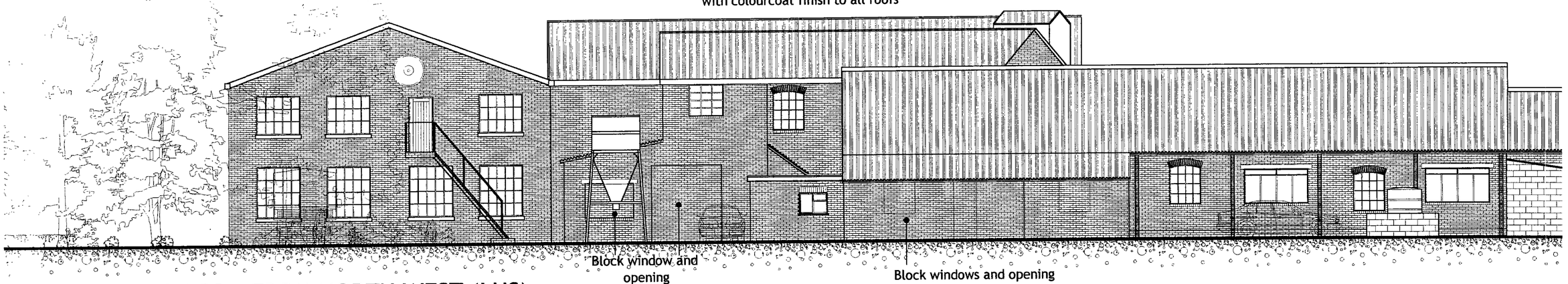
DRAWN BY | DATE
November 2000

DRAWING NO | SCALE
104/05 | 1:100

REVISION | DATE

PROPOSED ELEVATIONS

00/252 1/2



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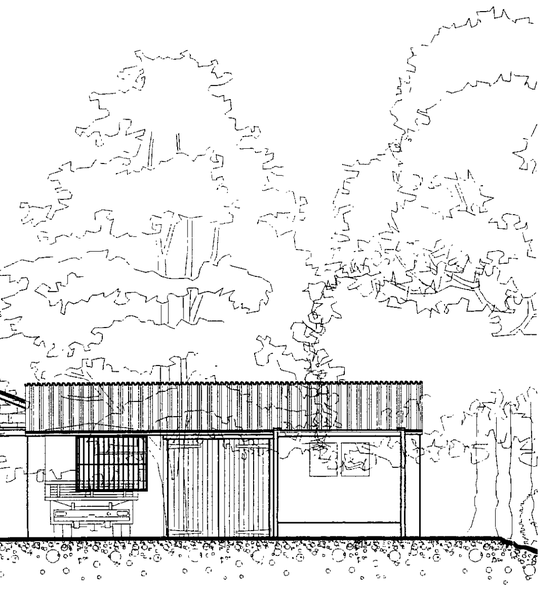
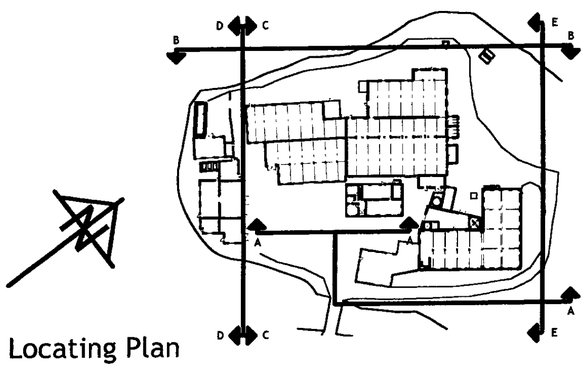


ELEVATION BB - FROM NORTH WEST (RHS)



Locating Plan

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DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
Planning Application - Proposed Elevations

DRAWN BY
DATE
November 2000

DRAWING NO
104/09

SCALE
1:100

REVISION
DATE

PROPOSED BUILDING PLANS

TANKS

00/25212

DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT: Apres Estates Ltd.

PROJECT: Syston Mills, Syston, Leicester

DESCRIPTION: PlanningApplication - Proposed Detail Plans

DRAWN BY | DATE: November 2000

DRAWING NO.: 104/03 | SCALE: 1:200

REVISION | DATE

REPAIR EXISTING HARDCORE AND CONCRETE ROADWAY TO EXISTING LEVELS.

FIT NEW DOORS TO STORE. REMOVE EXISTING ASBESTOS CLADDING AND OVERCLAD WITH NEW PROFILED METAL SHEET TO MATCH ROOFING.

REMOVE ASBESTOS CLADDING FROM GABLE END ETC AND REPLACE WITH METAL CLADDING PANELS ON NEW SHEETING RAILS FIXED BACK TO EXISTING STRUCTURE

Block windows at rear of unit to create storage area

REBUILD EXISTING STORE WITH NEW STEEL STRUCTURE AND METAL CLADDING TO MATCH ROOF SYSTEM.

REPLACE EXISTING DOOR WITH ELECTRIC SHUTTER, NATURAL ALUMINIUM FINISH.

CLOSE OFF OPENINGS AND FIRE RATE STRUCTURE TO GIVE SEPARATE TENACIES.

REFURBISH EXISTING TOILET BLOCK.

Reclad building in metal panelling to match new roofs

RETAIN EXISTING TANKS

RE-ROOF ALL EXISTING BUILDINGS WITH NEW INSULATED COMPOSITE PANEL SYSTEM WITH COLOURCOAT FINISH, COLOUR SLATE GREY OR TO L.A. APPROVAL. WHERE REQUIRED STIFFEN EXISTING STRUCTURE TO TAKE NEW FINISH AND TO ACCOMODATE WIND LOADINGS ETC TO CODE.

Fit new roller shutter

Fit new electric roller shutter

RE-ROOF ALL EXISTING BUILDINGS WITH NEW INSULATED COMPOSITE PANEL SYSTEM WITH COLOURCOAT FINISH, COLOUR SLATE GREY OR TO L.A. APPROVAL. WHERE REQUIRED STIFFEN EXISTING STRUCTURE TO TAKE NEW FINISH AND TO ACCOMODATE WIND LOADINGS ETC TO CODE.

Fit new electric roller shutter

Repair windows to match existing

FIT NEW STEEL FRAME WITH PROFILED METAL ROOFING TO MATCH NEW ROOFING TO MAIN BUILDINGS. FIT ANTI-SLIP NOSINGS TO STAIRS.

FORM NEW OPENING WITH ELECTRIC SHUTTER TO FORM NEW DELIVER / LOADING BAY. FIT NEW EXPOSED STEEL RSJ AS LINTEL TO MATCH CHARACTER OF EXISTING BUILDING.

BLOCK REAR WINDOW AND DOOR. REPLACE ROOFING OVER WITH SOLID COMPOSITE PANELLING.

EXISTING ROAD TO AND UPGRADED.

Fit new roller shutter

Overhaul lift and replace defective gear as necessary

Strip out redundant plant

EXISTING FIRST FLOOR TO BE FIRE RATED TO GIVE 1 HOUR FIRE SEPARATION TO ALLOW SUBDIVISION BY FLOOR OF EXISTING UNIT.

GRUB UP AND REMOVE SHRUBS ADJACENT BUILDING.

Reclad extension with metal cladding on new steel frame. Fit new electric shutter to delivery entrance

FIRE PROTECT EXISTING STRUCTURE (EG BEAMS) IN ACCORDANCE WITH BUILDING REGULATIONS

Form new wider doorway with double doors to match existing.

New blockwork wall

Remove fan on gable end and brick up to match existing

GRUB UP AND REMOVE SHRUBS ADJACENT BUILDING.

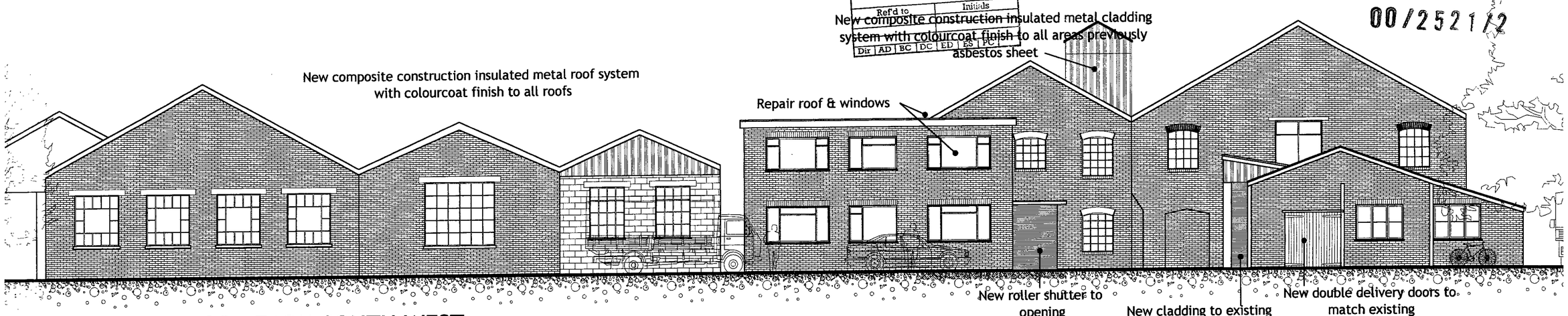
FIT NEW ACCESS STAIR TO ALLOW ADDITIONAL SUBDIVISION OF EXISTING BUILDING

EXISTING ROAD TO BE RETAINED AND UPGRADED.

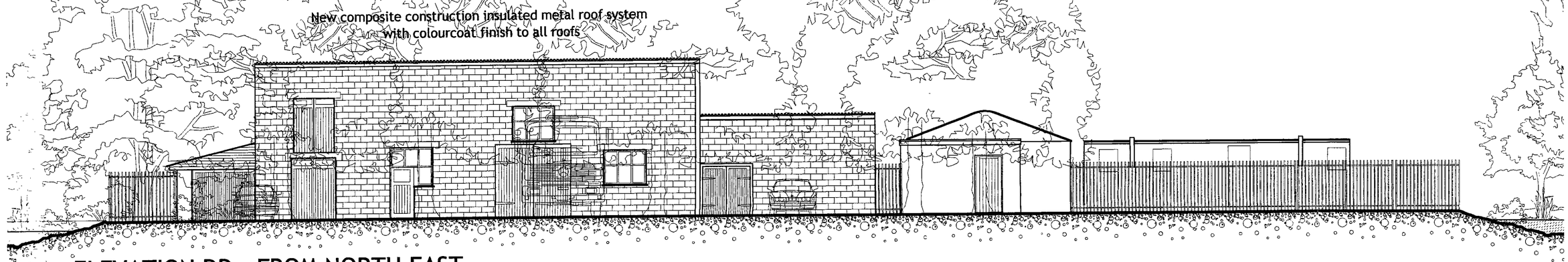
All areas and dimensions are approximate and should be verified on site. Any discrepancies and errors should be reported to the Architect before any work is put in hand.

PROPOSED ELEVATIONS

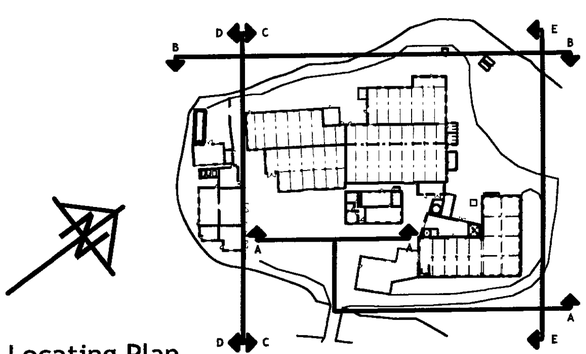
00/2521/2



ELEVATION CC - FROM SOUTH WEST



ELEVATION DD - FROM NORTH EAST



Locating Plan

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DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
Planning Application - Proposed Elevations

DRAWN BY | DATE
November 2000

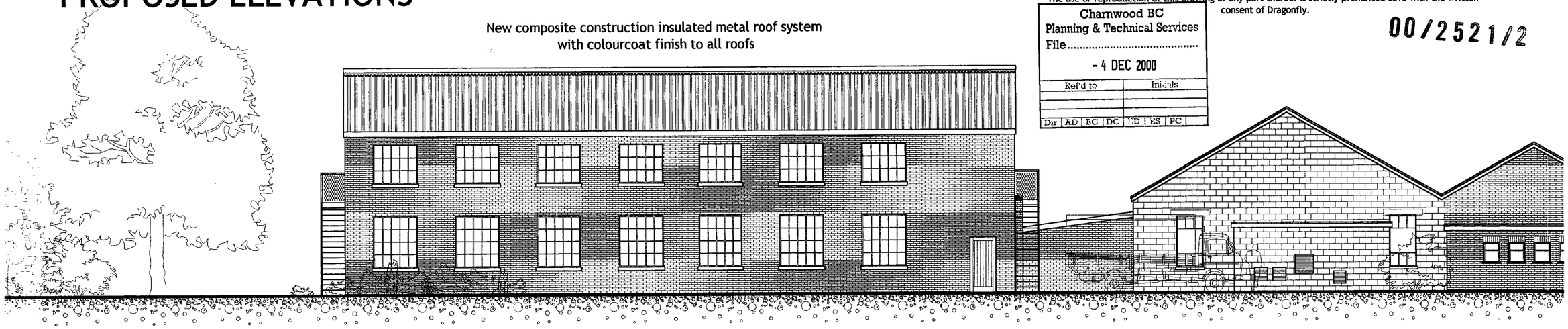
DRAWING NO. | SCALE
104/10 | 1:100

REVISION | DATE

PROPOSED ELEVATIONS

00/2521/2

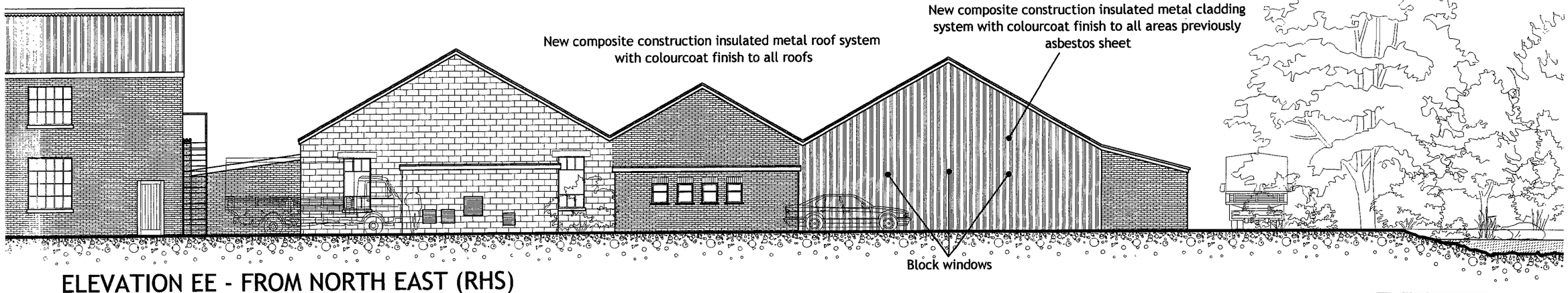
New composite construction insulated metal roof system with colourcoat finish to all roofs



ELEVATION EE - FROM NORTH EAST (LHS)

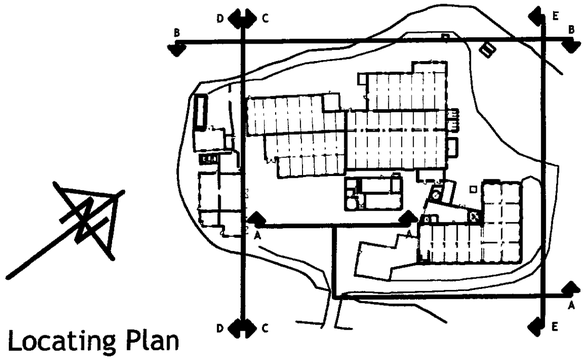
New composite construction insulated metal cladding system with colourcoat finish to all areas previously asbestos sheet

New composite construction insulated metal roof system with colourcoat finish to all roofs



Block windows

ELEVATION EE - FROM NORTH EAST (RHS)



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DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
Planning Application - Proposed Elevations

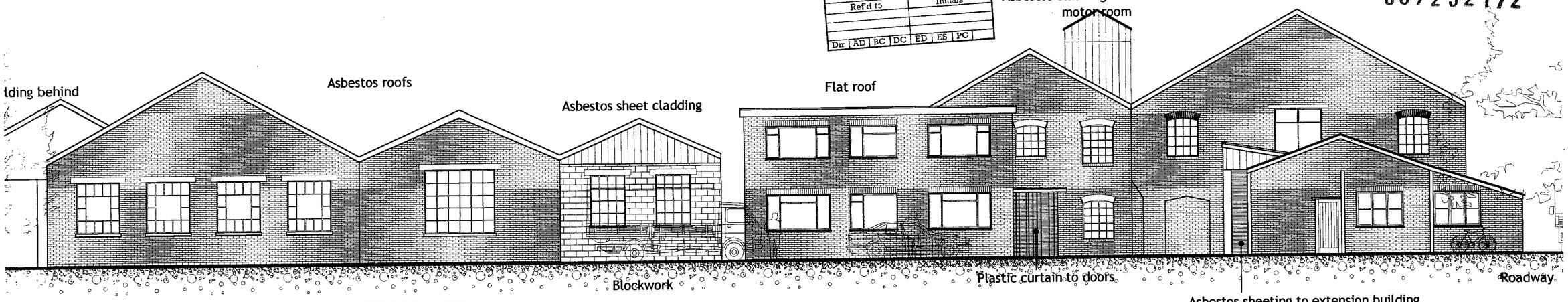
DRAWN BY | DATE
November 2000

DRAWING NO. | SCALE
104/11 | 1:100

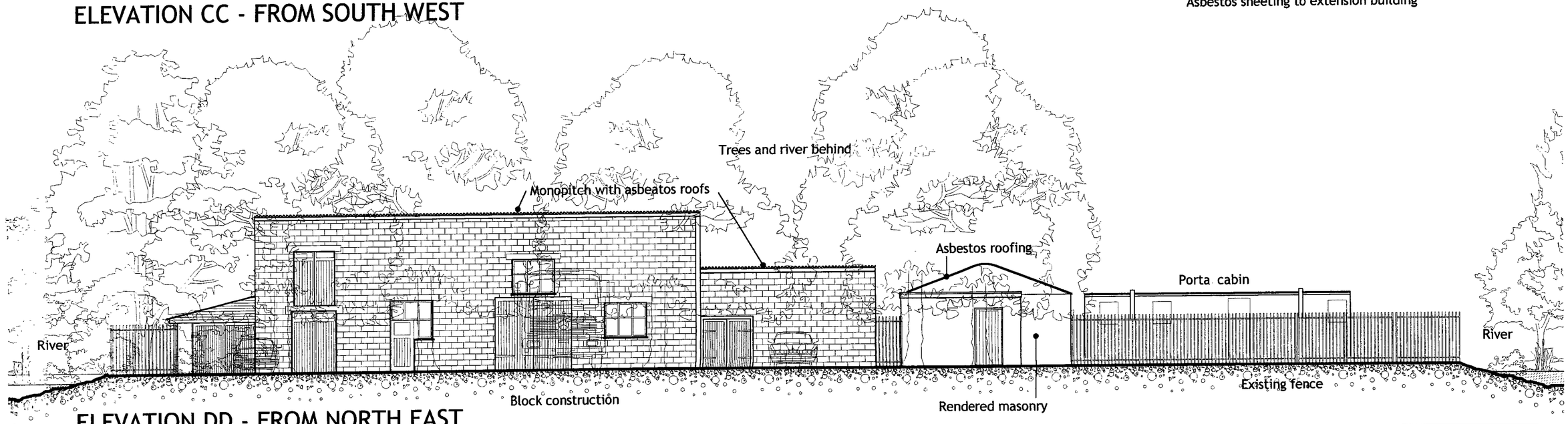
REVISION | DATE

EXISTING ELEVATIONS

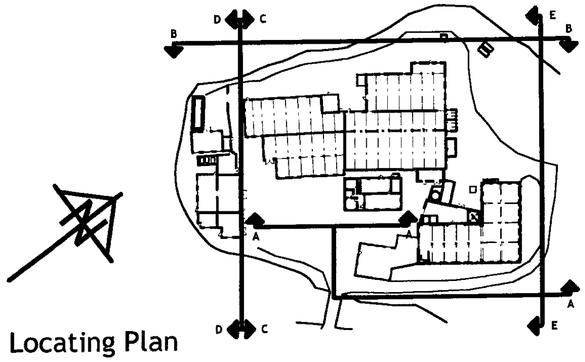
00/252/2



ELEVATION CC - FROM SOUTH WEST



ELEVATION DD - FROM NORTH EAST



Locating Plan

DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT: Apres Estates Ltd.

PROJECT: Syston Mills, Syston, Leicester

DESCRIPTION: Planning Application - Existing Elevations

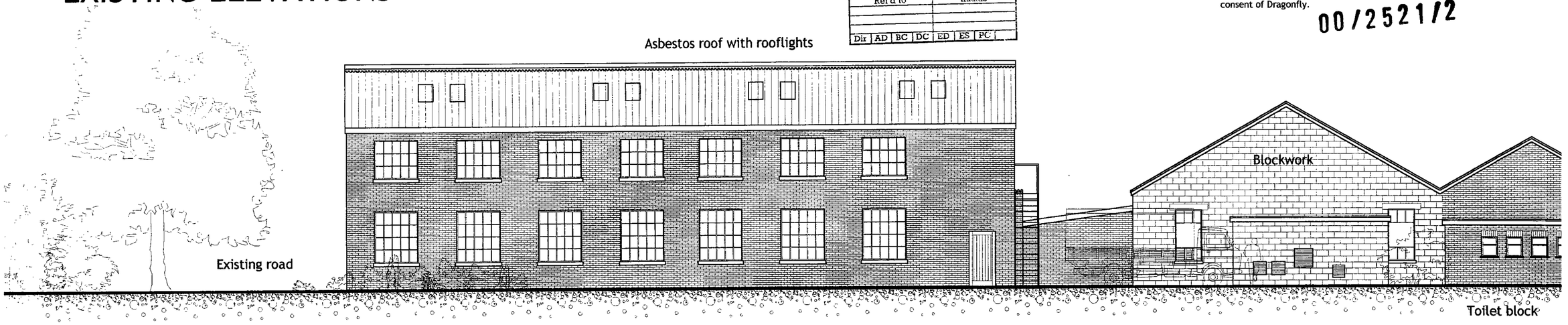
DRAWN BY | DATE: November 2000

DRAWING NO.: 104/06 | SCALE: 1:100

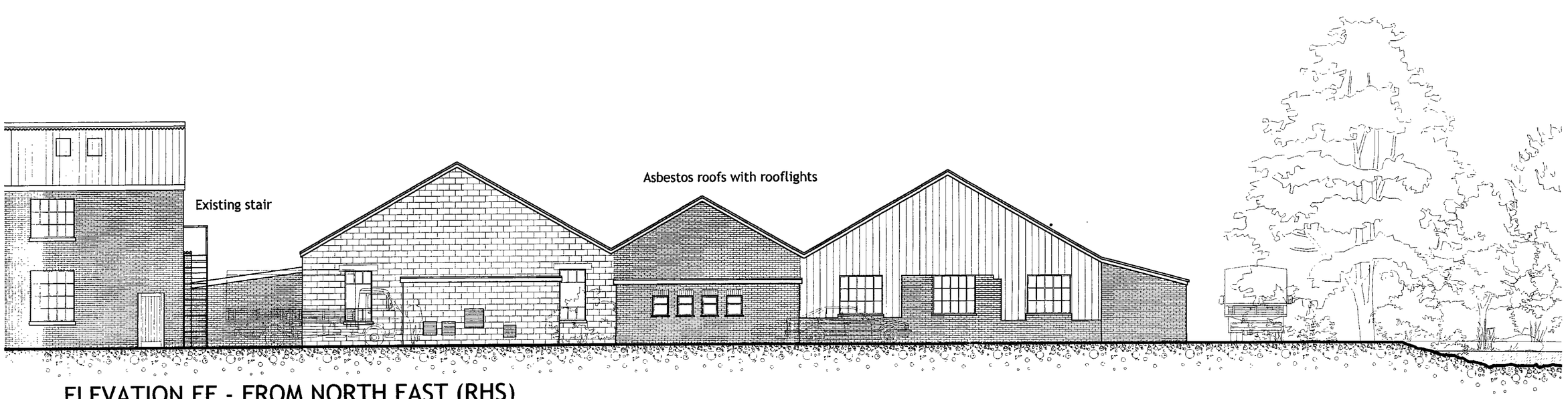
REVISION | DATE

EXISTING ELEVATIONS

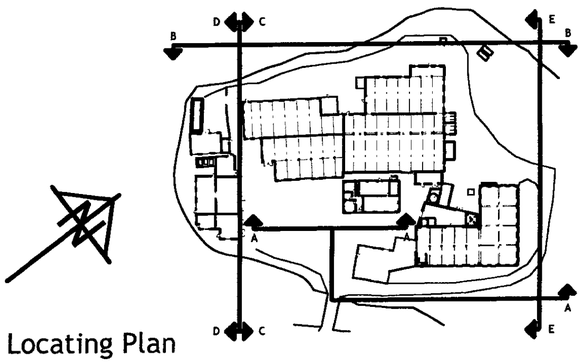
00/2521/2



ELEVATION EE - FROM NORTH EAST (LHS)



ELEVATION EE - FROM NORTH EAST (RHS)



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DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
Planning Application -
Existing Elevations

DRAWN BY
DATE
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104/07

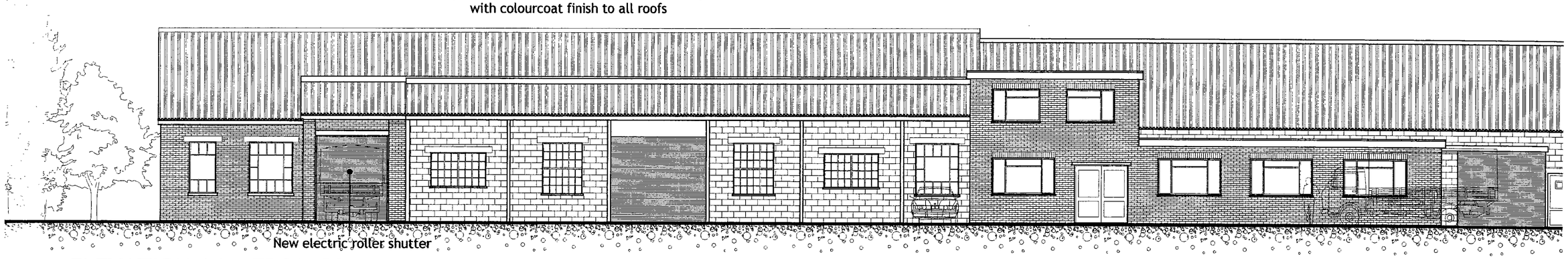
SCALE
1:100

REVISION
DATE

PROPOSED ELEVATIONS

00/2521/2

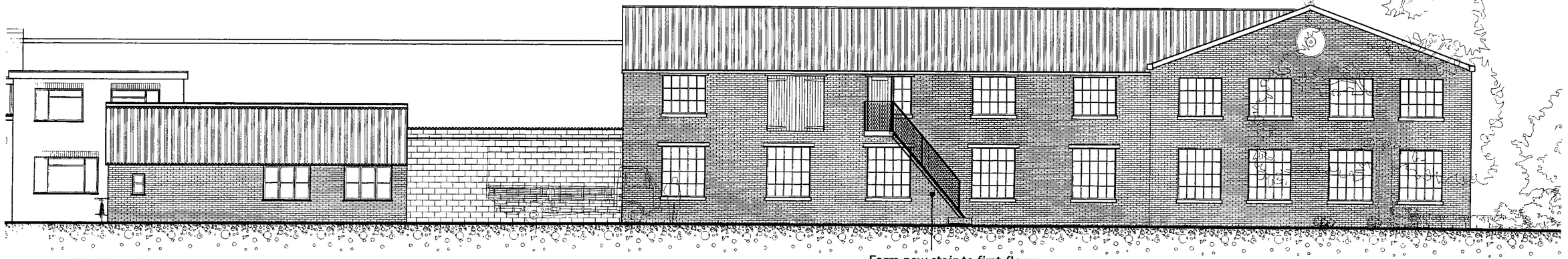
New composite construction insulated metal roof system with colourcoat finish to all roofs



New electric roller shutter

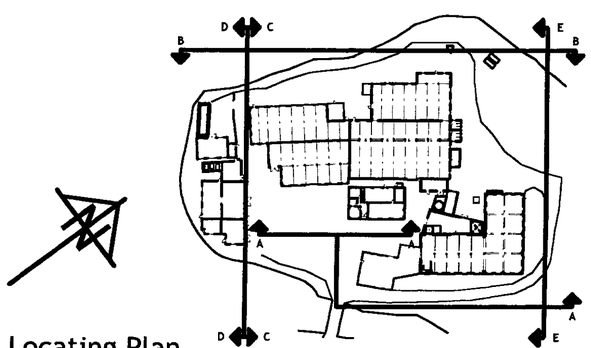
ELEVATION AA - FROM SOUTH EAST (LHS)

New composite construction insulated metal roof system with colourcoat finish to all roofs



Form new stair to first floor accommodation

ELEVATION AA - FROM SOUTH EAST (RHS)



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DRAGONFLY
ARCHITECTURAL DESIGN SERVICES

CLIENT
Apres Estates Ltd.

PROJECT
Syston Mills, Syston, Leicester

DESCRIPTION
Planning Application - Proposed Elevations

DRAWN BY	DATE
	November 2000
DRAWING NO	SCALE
104/08	1:100
REVISION	DATE

Borough of Charnwood

SOUTHFIELDS LOUGHBOROUGH LE11 2TN TEL (01509) 263151

DIRECTORATE OF PLANNING & TECHNICAL SERVICES

Jonathan Hale BSc (Hons) MSc MRTPI ARICS, Director
Stuart Moffat DipTP MRTPI Head of Development Control

The Environment Agency
Lower Trent (Planning Section)
Trentside Offices
Scarrington Road
West Bridgford
NOTTINGHAM
NG2 5FA

Please Contact: Phil Rowland

Direct Line: 634732

Our ref: P/00/02521/2
Your ref:

1st February 2001

Dear Sir,

TOWN & COUNTRY PLANNING ACT 1990
APPLICATION REFERENCE NUMBER P/00/02521/2
O.S. MAP REFERENCE SK6112

I refer to your response to my consultation in respect of the above application and would notify you that it was resolved to permit the proposal subject to the following condition(s):

1. The development shall be begun not later than 5 years from the date of this permission. [DT01]
   REASON: To comply with the requirements of Section 91 of the Town and Country Planning Act, 1990.

2. No development shall be commenced on the site until such time as a schedule of the types and colours of elevation and roofing materials to be used in the development have been submitted for the approval of the local planning authority. Only such materials as may be approved shall be used in the execution of the development. [MA04]
   REASON:In the interests of the appearance of the development and of the locality.

Note(s) to Applicant:
(a) The applicant is advised that the provision of any additional carparking or service areas is likely to require the submission of a formal application for planning permission.

(b) The applicants attention is drawn to the requirements and advice of the Environment Agency in the attached copy letter.

Yours faithfully,

Jonathan Hale

J S Moffat
Head of Development Control

GEXT

Appendix L

Galaxy Real Estate sale brochure

INDUSTRIAL INVESTMENT | FOR SALE

GALAXY REAL ESTATE

FREEHOLD SALE

SYSTON MILL INDUSTRIAL ESTATE
INVESTMENT FOR SALE

SIZE

38,556 SQ.FT COMPROMISED
19.5 ACRES SITE AREA

PRICE

OFFERS IN REGION OF
£2,850,000

FREEHOLD INVESTMENT DEAL WITH 10%+ YIELD

RENTAL INCOME CIRCA OF £297,000 PER ANNUM

SYSTON MILLS INDUSTRIAL ESTATE, MILL LANE,
SYSTON, LEICESTER, LEICESTERSHIRE, LE7 1NS

SIMARJEET SINGH | 07484 334939

KEVNEET GROVER | 07947 636931

WWW.GALAXYREALESTATE.CO.UK

INDUSTRIAL INVESTMENT | FOR SALE

GALAXY REAL ESTATE

DESCRIPTION

Syston Mill is an exciting investment opportunity that offers a secure income stream and potential for long-term growth.The freehold industrial estate comprises a total of approx 38,165 sq ft and is located 5.2 miles north of Leicester City Centre. The site area of 19.5 acres (7.9 hectares) is fully tenanted, generating a rental income of £297,441 per annum exclusive of VAT.

The industrial estate offers a range of facilities and services for businesses, as well as a central location near major transport links. As such, it is an attractive proposition for investors that are looking for a safe and reliable income stream. With its low risk and consistent returns, Syston Mill is an ideal investment opportunity for those seeking a long-term investment

LOCATION

Syston Mills Industrial Estate is conveniently located at Mill Lane, Syston, Leicester, Leicestershire, LE7 1NS. It is easily accessed from major transport links, including the A46 which is located just 1 mile away. Additionally, the estate is a mere 5.2 miles north of Leicester City Centre, offering direct links to the M1 motorway and other major cities. Syston Mills is an ideal location for businesses requiring excellent transport links and central access to the Midlands

VAT

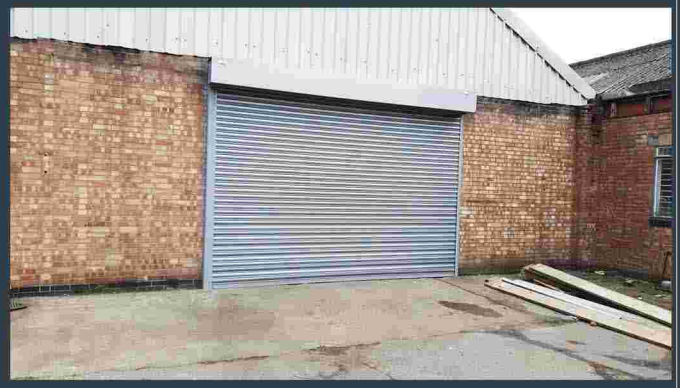
We are advised that VAT is applicable on this property.

Interested parties are advised to make their own enquiries accordingly.

TENURE

This site is available to purchase freehold

The Property has a rental income of £297,000 + VAT per annum



SYSTON MILLS INDUSTRIAL ESTATE, MILL LANE, SYSTON, LEICESTER, LEICESTERSHIRE, LE7 1NS

SIMARJEET SINGH | 07484 334939

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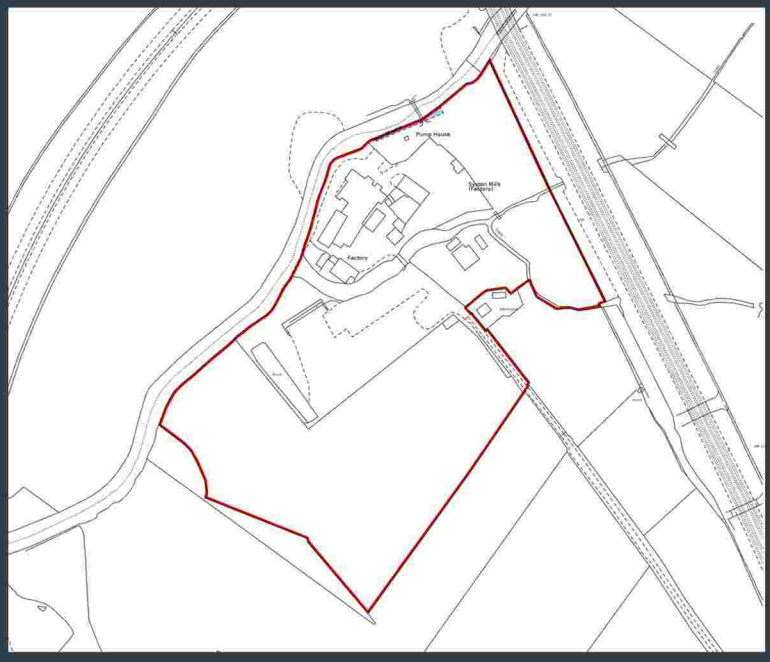
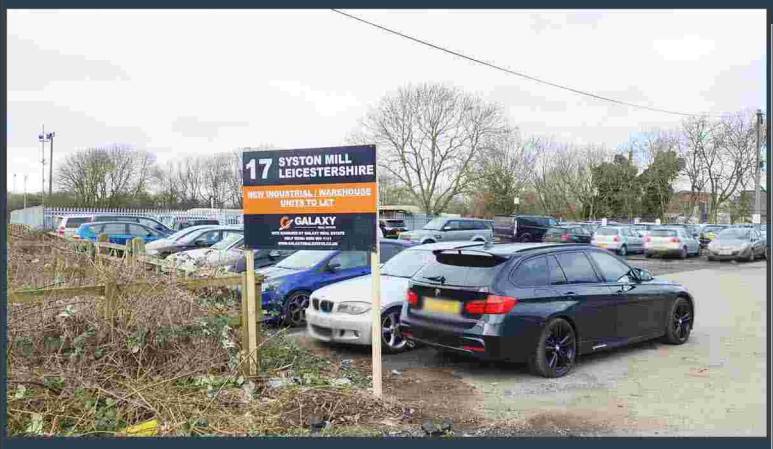
GALAXY REAL ESTATE





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1	Unit 7	Bogdan Feher Ltd	£2,880	£2,400	1300
1	2. Unit 7A	Recruitment Investments limited	£14,400	£12,000	1300
2	Unit 16	SMC/Staurt Michael Chander	£4,500.00	£3,750	1,055
4	1. Unit 18 2. Grazing Fields	Claire Watts	£4704.00 £960.00	£3920 £800	1,119
5	Unit 20	County Roofing (Leicester) Limited	£3,240.00	£2,700	764
6	1. Unit 22 2. External Parking Area	E Lease Limited	£18,144.00 £18,000.00	£15120 £15000	2,411
7	1. Unit 23 2. Yard	Another level Scaffolding (Midlands) Ltd	£25,200.00	£21,000	2,411
8	1. Unit A 2. Unit C 3.Leen To	Nomad Encon Limited	£15,840.00	£13,200	3,767
9	1. Unit D 2. Vehicle Compound 3. Unit 10 Office	Bogdan Feher Ltd	£36,288.00 £33,264.00 £9,072.00	£30,240 £27,720 £7,560	6480 1500
	Unit B1	Mr. Peter Chimanga	£20,880.00	£17,400	1750
10	Unit B2	Heritage Bodyworks Ltd Mr. Abdul Imran Sheikh	£18,000.00	£15,000	1643
11	Water Gauging Station	Environmental Agency			
12	Land	Nippon Autos Ltd/ Mrs Yasuko Muhammad (Mr. Sajid)	£21,600.00	£18,000	
13	Unit 17a	Mr. Hashim Ibrahim Waseem	£14,198.40	£11,831	1083
14	Unit 17b&c	Mr. Hassan Ghorbani	£54,000.00	£45,000	2476 6000
15	Unit E1		£20,160.00	£16,800	1522
16	Unit E2	Auto Motors MK LTD	£21,600.00	£18,000	1584
TOTAL			£356,929.20	£297,441	38,165

ENQUIRIES

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Appendix M

Crematoria Management Ltd, R (On the Application Of) v Welwyn Hatfield Borough Council [2018] EWHC 382 (Admin) (01 March 2018)

Neutral Citation Number: [2018] EWHC 382 (Admin)

Case No: CO/2806/2017

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
ADMINISTRATIVE COURT

IN THE MATTER OF THE TOWN AND COUNTR Y PLANNING ACT 1990
AND IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 1 March 2018

Before:

SIR WYN WILLIAMS
(Sitting as a Judge of the High Court)

- -

Between:

THE QUEEN on the application of
CREMATORIA MANAGEMENT LIMITED **Claimant**

- and –

WELWYN HATFIELD BOROUGH COUNCIL **Defendant**

- -
- -

Mr Peter Goatley (instructed by **Irwin Mitchell LLP**) for the **Claimant**
Mr Robin Green (instructed by **The Solicitor to the Defendant**) for the **Defendant**

Hearing date: 17 January 2018

- -

Judgment Approved

Sir Wyn Williams:

1. The Defendant is the owner and/or occupier of the cemetery known as Welwyn Hatfield Cemetery (hereinafter referred to as "the Site"). On 3 May 2017, acting in its capacity as local planning authority, the Defendant granted planning permission for development on the Site in the following terms:

> "Erection of a new chapel, machinery store and crematory, to include new car parking provision and enhanced landscaping following demolition of existing chapel, machinery store, lodge house and central colonnade."

2. In these proceedings by way of judicial review the Claimant seeks an order quashing that planning permission. The Claimant argues that the Defendant acted unlawfully when granting the planning permission; two discrete grounds are advanced in support of that contention. The Claimant's grounds are resisted with vigour by the Defendant. Before discussing and reaching conclusions upon each ground, it is appropriate to provide the context in which they are to be considered.

3. The Site comprises an area of land of 4.24 hectares. It lies within the green belt. It is described (uncontroversially) as being on the edge of open countryside. To the south and east of the Site there are fields. A park and ride facility is located to the west and there is residential development to the north. There are a number of buildings and/or structures upon the Site and within it there are plots for deceased persons who have been cremated as well as those who are to be buried. As is obvious from the terms of the planning permission, the Defendant wishes to demolish the existing buildings and structures and create a new crematorium.

4. The Claimant is the operator of a crematorium situated at Woollensbrook, Hertford Road, Hoddesdon, in the Borough of Broxbourne (hereinafter referred to as "the Broxbourne site"). This facility was in use prior to the grant of the planning permission which is the subject of these proceedings but, as I understand it, it has been in use for a comparatively short period of time. I do not know, precisely, the distance between the Site and the Broxbourne site but the evidence suggests that they are approaching 10 miles apart.

5. The planning application which led to the grant of planning permission on 3 May 2017 was supported by a number of documents. They were (i) a Planning Policy Statement; (ii) a Supplemental Planning Statement (iii) a Need Assessment and (iv) an Analysis of Potential Sites for a New Cemetery and Crematorium.

6. In advance of the decision to grant planning permission a detailed report was prepared for the Development Management Committee of the Defendant (the "planning committee"). This was the committee charged with making the decision upon the planning application. The author of the report was Mr Raphael Adenega n (see Trial Bundle page 142). Mr Adenegan addressed many issues in his report before recommending that planning permission should be granted subject to conditions. As I understand it, the planning permission granted on 3 May 2017 adopted all Mr Adenegan's recommendations as to the appropriate planning conditions.

Ground 1

7. The Claimant alleges that the Defendant failed to consider the need for a screening opinion and/or failed to undertake such screening and record the same on its register of decisions. These failures are said to be in breach of the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (as amended) (hereinafter

referred to as "the 2011 Regulations").

8. The term "screening opinion" is a term which appears in the 2011 Regulations. In regulation 2 it is defined as meaning "a written statement of the opinion of the relevant planning authority as to whether development is EIA development". The same regulation defines "EIA development" as being development which is either "Schedule 1 development" or "Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location". The references to Schedule 1 development and Schedule 2 development are references to Schedules 1 and 2 of the 2011 Regulations.

9. The relevant parts of regulations 4 and 5 of the 2011 Regulations are as follows:

> "4.—(1) Subject to paragraphs (3) and (4), the occurrence of an event mentioned in paragraph (2) shall determine for the purpose of these Regulations that development is EIA development.
>
> (2) The events referred to in paragraph (1) are—
>
> (a) the submission by the applicant or appellant in relation to that development of a statement referred to by the applicant or appellant as an environmental statement for the purposes of these Regulations; or
>
> (b) the adoption by the relevant planning authority of a screening opinion to the effect that the development is EIA development."

Regulation 5 provides:

> 5.—(1) A person who is minded to carry out development may request the relevant planning authority to adopt a screening opinion.
>
> …..
>
> (5) An authority shall adopt a screening opinion within 3 weeks beginning with the date of receipt of a request made pursuant to paragraph (1) or such longer period as may be agreed in writing with the person making the request. "

10. Regulation 7 provides:

> "7. Where it appears to the relevant planning authority that—
>
> (a) an application which is before them for determination is a Schedule 1 application or a Schedule 2 application; and
>
> (b) the development in question has not been the subject of a screening opinion or screening direction; and
>
> (c) the application is not accompanied by a statement referred to by the applicant as an environmental statement for the purposes of these Regulations,
>
> paragraphs (4) and (5) of regulation 5 shall apply as if the

> receipt or lodging of the application were a request made under regulation 5(1)."

11. There is no suggestion in this case that the development proposed in the planning application was EIA development because it fell within the ambit of Schedule 1 of the 2011 Regulations. Further, as a matter of fact, there was no request to the Defendant, as local planning authority, to adopt a screening opinion as to whether or not the development proposed was EIA development because it fell within Schedule 2. None of the documents submitted in support of the planning application suggested that the development was EIA development. The application was submitted on the basis that it did not constitute EIA development and that there was no need for a screening opinion upon that issue.

12. In these proceedings the Claimant contends that the development proposed is within Schedule 2 to the 2011 Regulations. This Schedule is in the form of a Table which is concerned with 13 different types of development. Column 1 of the Table contains the description of the 13 particular types of development with which the Table is concerned. Column 2 sets out applicable "thresholds and criteria" which must be satisfied before the development described within column 1 can be categorised as Schedule 2 development. The Claimant submits that the development under consideration in this case is properly to be categorised as an "infrastructure project" (column 1 Box 10) in that it constitutes an "urban development project" (column 1 Box 10 (b) which "includes more than 1 hectare of urban development which is not dwellinghouse development" – see Box 10 column 2 as amended by the Town and Country (Planning) (Environmental Impact Assessment) Regulations 2015.

13. On the basis of the pleaded case and the evidence adduced before me there are two central issues in relation to ground 1. First, as a matter of fact, did the Defendant, as local planning authority, consider whether there was a need for a screening opinion under the 2011 Regulations? Second, if the need for such an opinion was considered as a matter of fact, as the Defendant contends, was its conclusion that no such opinion was necessary unlawful?

14. The Claimant contends, correctly, that there is no contemporaneous document in existence which shows that the Defendant considered the need for a screening opinion. However, Mr Adenegan has made a witness statement dated 4 July 2017 (i.e. after the commencement of these proceedings) in which he sets out the process which was undertaken both before and immediately after the planning application was made. It is as well to set out his evidence in full.

> "4. Prior to the submission of a full planning application the applicants put in for a pre-application advice from the Local Planning Authority as a way to ascertain the acceptability of the proposal before the submission of a full planning application. As part of the process, officers had an onsite meeting with the applicants and their agents in October 2016 where the information/details submitted were analysed and discussed. The discussion took the form of an EIA screening having regard to the criteria listed in Schedule 3 (Regulations 5(4). It was considered at this meeting and subsequent discussions that an EIA scoping exercise may or may not be required subject to the reports/statements submitted with the full application.
>
> 5. In my assessment and consideration of the planning application for the new crematorium at the Cemetery House, South Way, Hatfield I considered whether the proposal was an

> Environmental Impact Assessment (EIA) development. After careful consideration of the criteria that trigger the need for an EIA as contained in the Town and Country Planning (Environmental Impact Assessment) Regulations 2011 (as amended) and the submitted supporting statements/information for the application, I concluded that the proposal is not an EIA development, and as such there was no requirement to submit an environmental statement. My conclusion is premised on the interpretation of the Regulations illustrated below.
>
> ……"

15. On the basis of Mr Adenegan's evidence it is clear that consideration was given as to whether a screening opinion was necessary and whether the development under consideration was EIA development. Mr Goatley, on behalf of the Claimant, did not invite me to reject Mr Adenegan's evidence notwithstanding no contemporaneous written record of what had occurred was produced. In my judgment, that was a proper stance for the Claimant to take. There is no firm evidential foundation which begins to suggest that Mr Adenegan's evidence was erroneous let alone untruthful. It follows that although no written record exists I am satisfied that the Defendant, through its duly authorised officer, Mr Adenegan, considered whether a screening opinion was necessary and whether the development constituted EIA developme nt. Further, it is clear that Mr Adenegan concluded that no screening opinion was necessary and that the development in question was not EIA development.

16. Following the extract from paragraph 5 of Mr Adenegan's statement set out above he summarised a number of the provisions of the 2011 Regulations including the Table within Schedule 2. He then continued:-

> "6. In my assertion based on the foregoing I considered that the closest applicable part of the criteria set out in Schedule 2 of the Regulation is that of 10(b) which deals with urban development projects relating to construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas. The proposal is for a crematoria, and as such not an urban project/development. This is because according to the Cremation Act, 1902 as amended and affected by the Cremation Act, 1952 "no crematorium shall be constructed nearer to any dwelling- house than 200 yards" (183m). This in my opinion would be difficult to achieve in an urban area but rather in a semi- rural, rural or semi- urban setting. In this case the proposed development is not in an urban area, is not of an urban nature (it sits within a designed parkland landscape) and would not have a significantly urbanising effect on the local environment. My assessment of the scheme by way of screening is that the proposal was not EIA development for the purposes of these Regulations.
>
> 7. In any event, contrary to what is alleged in the Claimant's statement of facts and grounds ("CSFG"), none of the thresholds for urban development projects in Schedule 2 was met.
>
> For the avoidance of doubt, the applicable thresholds and criteria were as follows:
>
> (i)The development includes more than one hectare of urban

development which is not dwellinghouse development; or

(ii) The development includes more than 150 dwellings; or

(iii) The overall area of the development exceeds 5 hectares.

Accordingly, the proposed development was not an urban development project; but even if it was, it did not meet any of the thresholds that would render it Schedule 2 development. There was therefore no need for me to adopt a screening opinion."

17. The phrase "urban development project" is not defined within the Regulations. Within column 1, Box 10, of the Table the phrase includes "the construction of shopping centres and car parks, sports stadiums, leisure centres and multiplex cinemas". It is not suggested that the phrase "urban development project" is limited to these types of development and I have no difficulty in accepting that the types of development set out in Box 10 are illustrative only. How then is the phrase to be interpreted and applied?

18. Detailed guidance in relation to that issue is to be found in the decision of the Court of Appeal in *R (Goodman) v London Borough of Lewisham* [2003] Env. L.R. 28. The relevant facts were these. The Claimant was a resident affected by the proposed redevelopment of a site having an area of 5540 m² for the construction of a warehouse and self-storage blocks. He sought judicial review of the Defendant's grant of planning permission for the development on the grounds that the local planning authority had erred in determining that the development did not require an environmental impact assessment. The basis of his claim was that the proposed development constituted an "urban development project" within predecessor regulations to the 2011 Regulations. At first instance the judge found that the local planning authority had been entitled to conclude that the proposed developme nt was not an urban development project – it could not be said that its decision on that issue was irrational or perverse and, accordingly, the claim was dismissed.

19. The Claimant's appeal to the Court of Appeal was allowed. The leading judgment was given by Buxton LJ with whom Brooke LJ and Morland J agreed.

20. Buxton LJ first analysed the process which must be undertaken by a local planning authority when the possibility exists that a planning application ma y be regarded as Schedule 2 development. He said this:

"[7] The first question for a planning authority is, therefore, to determine whether the application before it is a "Sch. 2 application": that is, in terms of the definition …. whether the development falls within the descriptions and limits set out in Sch. 2. Although the application becomes a Sch. 2 application by decision of the authority; and does not thereafter become an application for EIA development unless the authority further so decides; the authority cannot avoid the implications of the application being for EIA development simply by not taking the preliminary decisions at all….. The authority is bound to enter upon consideration of whether the application is for Sch. 2 development unless it can be said that no reasonable authority could think that to be the case…"

21. Buxton LJ next considered how the court should approach the issue of whether the development was an "urban development project". At paragraph 8. he expressed himself as follows:

> "8. In the present case, the only serious contender for a category of Sch. 2 development under which the application might fall is para 10(b) of the Schedule: infrastructure projects that are urban development projects. These are very wide and to some extent obscure expressions and a good deal of legitimate disagreement will be involved in applying them to the facts of any given case. That emboldened [the local planning authority] to argue, and the judge to agree, that such a determination on the part of the local authority could only be challenged if it were *Wednesbury* unreasonable. I do not agree. However fact-sensitive such a determination may be, it is not simply a finding of fact, nor of discretionary judgment. Rather, it involves the application of the authority's understanding of the meaning in law of the expression used in the regulation. If the authority reaches an understanding of those expressions that is wrong as a matter of law, then the court must correct that error: and in determining the meaning of the statutory expressions, the concept of reasonable judgment, as embodied in *Wednesbury*, simply has no part to play. That, however, is not the end of the matter. The meaning in law may itself be sufficiently imprecise that in applying it to the facts, as opposed to determining what the meaning was in the first place, a range of different conclusions might be legitimately available. That approach to decision making was emphasised by Lord Mustill, speaking for the House of Lords, in *R v Monopolies Commission, ex p. South Yorkshire Transport Ltd* [1993] 1 WLR 23, at p32G, when he said that there might be cases where the criterion, upon which in law the decision has to be made,
>
> > "may itself be so imprecise that different decision-makers, each acting rationally, might reach differing conclusions when applying it to the facts of a given case. In such a case the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational."
>
> 9. That is the decision as to whether the development is a Sch. 2 development. If the authority concludes that it is such, it then has to go on and decide whether that Sch. 2 development is also an EIA development, by determining whether it is likely to have significant effects on the environment by virtue of factors such as its nature, size or location. That is an enquiry of a nature to which the *Wednesbury* principle does apply, and I understand Sullivan J, to have so held in *R (on the application of Malster) v Ipswich Borough Council* [2002] PLCR 251 [61]."

22. Before me, there was a great deal of debate about paragraph 8 of the judgment of Buxton LJ. Reduced to its essentials, however, Mr Green for the Defendant submits that the whole of paragraph 8 constitutes the *ratio decidendi* of *Goodman* and is binding upon me. Mr Goatley submits that the *ratio* of the decision ends half way through paragraph 8 and that the part of the paragraph which follows the words "That, however, is not the end of the matter" constitutes *obiter dicta*.

23. I cannot accept that Mr Goatley is correct in his analysis of paragraph 8. It seems to me to be clear that the whole paragraph is central to the reasoning of the learned judge and it provides the basis for the actual decision in the case. My view is reinforced by a short passage from paragraph 13 of the judgment. This paragraph falls within that part of the judgment which is under the sub-heading "The decision in this case". At paragraph 13 Buxton LJ observed:

> ""Infrastructure project" and "urban development project" are terms of wide ambit, perhaps more easily understood by those versed in planning policy than by mere lawyers, and attracting the observations of Lord Mustill quoted in paragraph 8. above."

24. Given my conclusion that paragraph 8 constitutes part of the *ratio* of *Goodman*, I am bound by it unless it has been overruled either expressly or impliedly by later authority of the House of Lords or Supreme Court.

25. Is that the effect of the decision of the Supreme Court in *Tesco Stores Ltd v Dundee City Council* [2012] PTSR 983? In this case Asda Stores Ltd submitted an application for planning permission to build a superstore on the outskirts of Dundee. The local structure and development plans provided for a sequential approach to site selection for new retail development which meant that large out of centre retail development would only be acceptable when it could be established that no suitable site was available, in the first instance, within and, thereafter, on the edge of a city, town or district. Tesco objected to the proposal on the basis that there was a suitable site within a local district centre. Despite the objection, planning permission was granted. Tesco sought to quash the planning permission on the ground that the planning authority had misinterpreted the development plan. The claim for judicial review failed and all appeals, including the appeal to the Supreme Court, were dismissed.

26. The leading judgment in the Supreme Court was given by Lord Reed. Having stated the long-established principle that a local planning authority must proceed upon a proper understanding of the development plan, he continued:-

> "18. In the present case, the planning authority was required by section 25 to consider whether the proposed development was in accordance with the development plan and, if not, whether material considerations justified departing from the plan. In order to carry out that exercise, the planning authority was required to proceed on the basis of what Lord Clyde described as "a proper interpretation" of the relevant provisions of the plan. We were, however, referred by counsel to a number of judicial dicta which were said to support the proposition that the meaning of the development plan was a matter to be determined by the planning authority: the court, it was submitted, had no role in determining the meaning of the plan unless the view taken by the planning authority could be characterised as perverse or irrational. That submission, if correct, would deprive sections 25 and 37(2) of the 1997 Act [a reference to the Town and County Planning (Scotland) Act 1997] of much of their effect, and would drain the need for a "proper interpretation" of the plan of much of its meaning and purpose. It would also make little practical sense. The development plan is a carefully drafted and considered statement of policy, published in order to inform the public of the approach which will be followed by planning authorities in decision- making unless there is good reason to depart from it. It is intended to guide the behaviour of

> developers and planning authorities. As in other areas of administrative law, the policies which it sets out are designed to secure consistency and direction in the exercise of discretionary powers, while allowing a measure of flexibility to be retained. Those considerations point away from the view that the meaning of the plan is in principle a matter which each planning authority is entitled to determine from time to time as it pleases, within the limits of rationality. On the contrary, these considerations suggest that in principle, in this area of public administration as in others (as discussed, for example, in *R (Raissi) v Secretary of State for the Home Department* [2008] QB 836), policy statements should be interpreted objectively in accordance with the language used, read as always in its proper context.
>
> 19. That is not to say that such statements should be construed as if they were statutory or contractual provisions. Although a development plan has a legal status and legal effects, it is not analogous in its nature or purpose to a statute or a contract. As has often been observed, development plans are full of broad statements of policy, many of which may be mutually irreconcilable, so that in a particular case one must give way to another. In addition, many of the provisions of development plans are framed in language whose application to a given set of facts requires the exercise of judgment. Such matters fall within the jurisdiction of planning authorities, and their exercise of their judgment can only be challenged on the ground that it is irrational or perverse (*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759, 780 per Lord Hoffmann). Nevertheless, planning authorities do not live in the world of Humpty Dumpty: they cannot make the development plan mean whatever they would like it to mean. "

27. Lord Reed then considered the meaning of the word "suitable". At paragraph 21 he said:

> "21. A provision in the development plan which requires an assessment of whether a site is "suitable" for a particular purpose calls for judgment in its application. But the question whether such a provision is concerned with suitability for one purpose or another is not a question of planning judgment: it is a question of textual interpretation, which can only be answered by construing the language used in its context. In the present case, in particular, the question whether the word "suitable", in the policies in question, means "suitable for the development proposed by the applicant", or "suitable for meeting identified deficiencies in retail provision in the area", is not a question which can be answered by the exercise of planning judgment: it is a logically prior question as to the issue to which planning judgment requires to be directed."

28. Neither *Goodman* not the observations of Lord Mustill in the *Monopolies and Mergers Commission* case were cited in *Tesco Stores Ltd* nor were they referred to in the judgements of their lordships. That is hardly surprising. *Goodman* is a decision about the proper approach to regulations and the *Monopolies and Merger Commission* case is concerned with the interpretation of primary legislation; *Tesco Stores* is

concerned with the proper approach to the interpretation of planning policy.

29. That said, I do not consider that there is any tension between the approach to statutory interpretation set out in *Goodman* and the approach in *Tesco Stores Ltd* as it relates to the interpretation of planning policy. Buxton LJ in *Goodman* proceeds on the basis that the interpretation of a regulation is a question of law to be determined by a court. Lord Reed, in *Tesco Stores Ltd*, considers that planning policy must be interpreted objectively and the ultimate arbiter of its meaning is the court. He explicitly accepts, however, that the language of policy statements may often be framed in terms which requires the exercise of judgment when the words are applied to given facts. It is obvious that many planning policies are couched in terms which are wide in their ambit or even obscure in their meaning which, inevitably, means that a degree of judgment will be involved when a decision maker is called upon to apply the policy statement in a particular context.

30. Since judgment is necessarily involved in applying words of a planning regulation or policy which has an imprecise meaning there will be occasions when different decision makers confronted with the same factual circumstances will apply the statutory provision or policy statement differently. That is a common feature of the decision making processes in this field of law but that does not mean, as Mr Goatley submits, that the world of "humpty dumpty" prevails. It is simply an acknowledgment of the difficulties inherent in decision making when the words to be applied by the decision maker are imprecise.

31. In my judgment paragraphs 8 and 9 of *Goodman* constitute or form part of its ratio. *Tesco Stores Ltd* did not overrule the ratio of *Goodman* either expressly or impliedly. Accordingly, I am bound to follow paragraphs 8 and 9 of the decision in *Goodman*.

32. The phrase "urban development project" cannot be given a precise meaning. I agree with the observations made by Buxton LJ at paragraph 13 of his judgment in *Goodman* – see paragraph 23 above. However, it does seem to me that at its core the development must be urban in character. The standard dictionary definition of the word "urban" is "in, relating to or characteristic of a town or city". I do not suggest that the phrase "urban development project" should be defined strictly by reference to this dictionary definition. It does, however, provide a useful starting point. Without doubt, however, a variety of factors will usually be relevant to an assessment of whether development is to be characterised as urban. It would be wrong to seek to lay down an exhaustive set of criteria by which to assess whether a project constitutes urban development. No doubt, such factors as its nature, size, location and the use to which it will be put are likely to be relevant in most cases. However, I cannot stress too much that this is not intended to be an exhaustive list of factors by which to make the relevant judgment. It is simply meant to be an acknowledgment or an indication that a variety of factors will usually need to be considered in any given case before a judgment is reached. It should not be forgotten, too, that it will sometimes be the case that factors under consideration will themselves be imprecise.

33. In the light of the preceding paragraph and the legal analysis which preceded it I have reached the conclusion that Mr Adenegan did not act unlawfully when he determined that the development of the Site for which planning permission was sought did not constitute an "urban development project". His reasons for so concluding are set out in paragraph 6 his proof of evidence – see paragraph 16 above. He was entitled to conclude and rely upon his assessment that the development was not in an urban area, that it was not of an urban nature when looked at as a whole and that it would not have a significantly urbanising effect on the local environment. In my judgment those factors properly led him to conclude the permission was not being sought for an urban development project.

34. If I had been the primary decision- maker I would not have relied upon the Cremation

Act 1902 as part of my process of assessment. However, I cannot say that this was an irrelevant consideration and, in any event, the pleaded case against the Defendant does not allege that reliance upon that statutory provision, of itself, rendered the decision unlawful.

35. It must follow that ground 1 fails. However, I cannot leave this ground without reference to a further point which was debated before me. In his proof of evidence at paragraph 7 Mr Adenegan explained that he had also considered whether the thresholds and criteria set out in column 2 of Schedule 2 were met even though he had concluded that the development proposed for the Site was not to be regarded as an urban development project. His view was that none of the thresholds and criteria could be met; in particular, the development did not include more than 1 hectare of urban development. This conclusion is challenged by Mr Goatley.

36. In support of the submission that the development proposed for the Site includes more than 1 hectare of urban development reliance is placed upon the witness statement and exhibits produced by Mr Peter Greenwood, a chartered architect who has analysed the plans which accompanied the planning application and "identified those parts of the site which are intended to be physically developed as part of the proposal pursuant to the planning permission, whether by way of built development, demolition, landscaping, highway works or other operational development." Mr Greenwood's evidence is that the sum of the areas of those parts is 1.21 hectares.

37. Mr Green did not object to Mr Greenwood's evidence being admitted before me. He submits, however, that when Mr Greenwood's evidence is properly analysed it does not support the conclusion that the proposed development included more than 1 hectare of urban development. He points to the fact that the total area of 1.21 hectares includes areas in which buildings/structures and built features currently on the Site are to be demolished; it also includes areas which would be the subject of landscaping.

38. My task is to interpret the phrase "urban development" in the context in which it appears in the Table and to apply it to the form of development proposed by the Defendant. I have reached the conclusion that the phrase is not apt to include the built areas which are to be demolished, especially since those areas are in substantial part to be replaced with new built areas. In the context of this case, at least, the phrase "includes more than 1 hectare of urban developme nt" might be capable of describing new built areas (including hard surfaces) but would not be capable of describing the demolition of existing structures which are being demolished because they will be rendered redundant or unsightly by reason of the build ing of new structures. If the principal demolished areas are removed from Mr Greenwood's calculations the "urban development" cannot exceed 1 hectare. Further, and in any event I have considerable reservations about whether the landscaping of the Site could constitute "urban development". Since it is unnecessary to do so, however, I do not propose to rule upon that issue definitively.

Ground 2

39. I can deal with this ground much more succinctly. It is common ground that it was necessary for the Defendant to demonstrate that there was a need for the development proposed on the Site given its location in the Green Belt. On behalf of the Claimant, it is submitted that need was not established because the need assessment undertaken on behalf of the Defendant did not take account of the capacity of the Broxbourne site.

40. As I have said the Defendant submitted a written need assessment in support of the planning application ("the Need Assessment"). Within the Executive Summary set out at the beginning of the document the following sentence appears

> "The partially constructed crematorium in Broxbourne has also been factored into the analysis"

41. Within the body of the document there are a number of references to the Broxbourne site all suggestive of the proposition set out in the Executive Summary. Despite these references it became clear during the hearing that the Need Assessment had not, in fact, "factored" the capacity of the Broxbourne site into the analysis of need.

42. During his oral submissions Mr Green submitted that the capacity of the Broxbourne site was irrelevant given the methodology adopted in the Need Assessment. He conveniently summarises that methodology and the conclusions reached in paragraph 20 and 21 of his skeleton argument. No useful purpose would be served in setting out the substances of those paragraphs because, as Mt Green points out, the Claimant does not argue in the detailed facts and grounds supporting this claim that the methodology adopted by the Defendant was irrational or perverse or otherwise unlawful.

43. The ground as pleaded so far as relevant is as follows:-

> "39 At the time the decision was taken the Claimant's new facility at Broxbourne had recently opened. That facility had the ability to accommodate circa 1,200 cremations per annum.
>
> 40 Whilst paragraph 10.59 of the officer's report refers to this new crematorium at Broxbourne, it makes no reference to its quantitative capacity, its qualitative features or the ability of that new facility to meet the need for a crematorium in the Council's district either now. Or at any relevant point in time in the future. This is a material omission.
>
> 41 In consequence, the council members were neither fully informed or were, in consequence misled as to the need for a crematorium of the type proposed and/or at this time"

44. In fact the pleaded case is not entirely accurate. Paragraph 10.59 of the officer's report does indeed refer to the Broxbourne site. However, contrary to the pleaded case, the reference appears in a sentence which identifies a number of crematoria "in the area" and which are said to be "close to their maximum capacity". Far from making no reference to its quantitative capacity the officer's report advises members that the Broxbourne site was close to its maximum capacity.

45. The Defendant acknowledges that the reference to the Broxbourne site being close to its maximum capacity is erroneous. However, Mr Green submits that this error "did not in any way affect the findings of the needs assessment" – a reference, no doubt, to the Need Assessment which supported the planning application.

46. I am prepared to accept that the error in Mr Adenegan's report did not impact upon the methodology deployed in the Need Assessment. However, that is not the point. Paragraph 10.59 appears in the section of his report which identifies "considerations which weigh in favour of the development". Between paragraphs 10.54 and 10.60 Mr Adenegan considers a number of issues relevant to whether a quantitative need for the development exists. A substantial part of his analysis is, without doubt, concerned with the Need Assessment. However, there can be no doubt, too, that paragraph 10.59 is concerned with the capacity of existing facilities including the Broxbourne site. On any fair reading of this paragraph the members of the planning committee are being told that all relevant existing crematorium facilities are either close to their maximum capacity or near full capacity. In my judgment, the effect of this paragraph is that members were being advised that a factor to be taken into account and which

supported the grant of planning permission was that existing facilities were inadequate, in terms of capacity, to meet the need for crematoria in the area.

47. Given the way in which the report of Mr Adenegan is written I do not accept that the capacity of the Broxbourne site was an irrelevant consideration. Further, I am satisfied that the effect of paragraph 10.59 was to significantly mislead the planning committee about a material consideration. There is no suggestion that the error made in the report was corrected at the meeting at which the planning application was decided. Accordingly, following *Oxton Farms, Samuel Smiths Old Brewery (Tadcaster) v Selby District Council 1997 WL 1106106*, I conclude that the Defendant's decision to grant itself planning permission for the development on the Site was vitiated by legal error.

48. I acknowledge that the basis of my decision on this ground is, to an extent, at variance with the pleaded case. However, I do not consider this gives rise to an injustice. The nub of the Claimant's case was always that the Defendant failed to take into account a material consideration, namely, the capacity of the Broxbourne site to meet what was said to be the need for a crematorium upon the Site. In essence that is what I have found since it is acknowledged that the true capacity of the Broxbourne site to meet the need for a crematorium was never assessed.

49. I turn, finally, to section 31(2A) of the Senior Courts Act 1981. I must refuse the quashing order which is sought if it appears to be high likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred. In this case I must assess whether it was highly likely that planning permission would have been granted if the erroneous information about the capacity of the Broxbourne site had not been placed before the members.

50. My recollection is that I did not rule out the possibility of further submissions being made about how section 31(2A) should be applied once the parties knew of my conclusions upon the substantive issues. Accordingly, the Defendant may, if it chooses, put in further short written submissions which must be served upon the Claimant's advisors by 12 noon Wednesday 28 February 2018. I should make it clear, however, that my strong provisional view is that section 31(2A) of the 1981 Act cannot avail the Defendant in this case and that I should make a quashing order.

51. Notwithstanding the view I expressed in the preceding paragraph, I received short written submissions from Mr Green and submissions in reply from Mr Goatley. I am simply not persuaded that I can say that had the material error not occurred it is highly likely that the decision as to the grant of planning permission would have been the same. The prospect that the Broxbourne site had spare capacity was or at least may have been a factor of some significance, potentially, given the fact that this was a proposed development in the Green Belt. Accordingly, I grant the quashing order sought.

Appendix N

PINS decision in respect of APP/U1430/W/24/3342573

The Planning Inspectorate

Appeal Decision

Hearing held on 24 July 2024

Site visit made on 24 July 2024

by A Hunter LLB (Hons) PG Dip MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 12 August 2024

Appeal Ref: APP/U1430/W/24/3342573
Beulah Baptist Church, Clifford Road, Bexhill, East Sussex TN40 1QA

- The appeal is made under section 78 of the Town and Country Planning Act 1990 (as amended) against a refusal to grant planning permission.
- The appeal is made by The Trustees of Beulah Baptist Church against the decision of Rother District Council (RDC).
- The application Ref is RR/2023/1498/P.
- The proposed development is described as "the demolition of existing Sanctuary and Buckhurst Room Hall and construction of a new church and community centre with associated external works. Retention of Clifford Hall and alterations of the Beulah Centre elevation on Clifford Road."

Decision

1. The appeal is dismissed.

Preliminary Matters

2. Following the Council's notice of decision, the National Planning Policy Framework (the Framework) was revised on 19 December 2023. Having regard to the matters that are most relevant to this appeal, there have been few substantive changes. Hence, I am satisfied that no one will be prejudiced by the changes to the national policy context, and both parties have had the opportunity to make comments on the revised Framework within their statements and final comments.

3. I am also aware of both the Deputy Prime Minister and Secretary of State for Housing, Communities, and Local Government's Written Ministerial Statement "Building the homes we need" dated 30 July 2024 regarding changes to the planning system, and the consultation "Proposed reforms to the National Planning Policy Framework and other changes to the planning system" dated 30 July 2024. However, I am content that the issues they both raise are not material to the determination of the appeal proposal, consequently, there has been no need to seek the views of the parties in regard to these proposed changes.

4. The Council acknowledged that its reference within its notice of decision to Policy BEX1 of the Rother Local Plan, Core Strategy, adopted September 2014 (RLP) was an error. It should have stated RLP Policy BX1, a copy of the correct policy was subsequently provided, and shared with the appellants. The appeal has been determined on this basis.

5. During the event the Council mentioned Annex 4, which is referred to by RLP Policy EN3 and provides some brief expansion on design principles. However, the Council had not provided a copy of Annex 4 in advance of the event. A copy was subsequently provided and shared with the appellants. The appeal was determined on this basis, and I am satisfied that no one has been prejudiced by the acceptance of this additional information.

6. Both parties have made me aware of an earlier appeal decision[1] at the appeal site relating to the demolition of The Sanctuary and the Buckhurst Room, together with its redevelopment ('the earlier appeal decision'). I have had regard to the earlier appeal decision insofar as it is relevant to the appeal scheme before me.

7. The appellants submitted Preliminary Ecological Appraisal and Preliminary Roost Assessment, dated June 2023, prepared by Arborweald Environmental Planning Consultancy (PEA) states that two further bat surveys are required to establish the presence of bats that may or may not be using the buildings at the appeal site. In light of this, and in the absence of any further surveys, the main parties' comments were sought as to whether there was sufficient information regarding protected species. Following this, the appellants submitted a brief statement from Arborweald Environmental Planning Consultancy, dated 16 July 2024, which referred to one of these recommended surveys being undertaken. I will return to this later in my decision.

Main Issues

8. In view of the above, and taking into account the reason outlined on the Council's notice of decision, the main issues are:

   - the effect of the proposed development on the non-designated heritage asset (NDHA), known as The Sanctuary;

   - the effect of the proposed development on the character and appearance of the building and the area, with particular regard to its scale and design; and,

   - the effect of the proposed development on protected species.

Reasons

NDHA

9. Beulah Baptist Church is not listed, nor is it located within a Conservation Area. The buildings at the appeal site comprise four distinct elements; The Sanctuary, which is a large gabled building said to have been built in the 1890's, and used as a place of worship with openings on its sides, it also has a tall tower constructed of brick; the Buckhurst Room, which is a modern single storey building, said to have been built in the 1980's and attached to one side of The Sanctuary providing a community space; the Beulah Centre, a modern two storey building also said to have been constructed in the 1980's, built of brick, and attached to the rear side of The Sanctuary; and Clifford Hall, a brick built building with a front facing gable said to have been constructed in the 1890s located on the other side of the Beulah Centre.

10. The Council considers the two oldest parts of the complex of buildings, Clifford Hall and The Sanctuary, to be non-designated heritage assets (NDHAs).

[1] Appeal Ref: APP/U1430/W/21/3284583

Clifford Hall is to be fully retained and not altered as part of the proposal, as a result no unacceptable effects on Clifford Hall as a NDHA have been identified by the main parties, and I see no reason to disagree. It was clear at the event that both main parties agree that The Sanctuary is a NDHA, however there is some variance in opinion as to its degree of significance, particularly in respect of its architectural quality, its contribution towards townscape merit, and its cultural significance.

11. Paragraph 203 of the Framework advises that account should be taken of heritage assets, including the positive contribution that conservation of heritage assets can make to sustainable communities, and the desirability of new development making a positive contribution to local character and distinctiveness. Paragraph 209 of the Framework states "the effect of an application on the significance of a non-designated heritage asset should be taken into account in determining the application. In weighing applications that directly or indirectly affect non-designated heritage assets, a balanced judgement will be required having regard to the scale of any harm or loss and the significance of the heritage asset."

12. The most relevant policies of the development plan in this regard and as set out in the agreed Statement of Common Ground dated 13 June 2024 (SoCG) are: RLP Policy EN3, insofar as it seeks to ensure new development contributes positively to the character of the site and surroundings; and RLP Policy BX1, which seeks to conserve and enhance the town's distinct and independent character.

13. The Sanctuary has a community value as a place of worship, although noting from my site inspection and from what I heard at the event, most of the other community uses take place in other parts of the complex of buildings. It was said at the event that the congregation currently is between 250-300 worshipers, which indicates to me it has a considerable community value and cultural significance as a long-established place of worship. Although I do recognise, despite its association with the Spurgeon family, it was not visited by the prominent preacher Charles Haddon Spurgeon, who died before it was built, and although his wife and sons did have a connection to the building following his death, it is of a lesser significance. Moreover, it was established at the event that the plaques relating to the Spurgeon family could be incorporated into the retained or proposed development through a suitable planning condition, in the event the appeal is allowed.

14. The appeal site is located on a corner with frontages onto both Buckhurst Road, and Clifford Road. What would have been the front of The Sanctuary together with its tower, and the Buckhurst Rooms, face onto Buckhurst Road. The side of The Sanctuary that faces onto Clifford Road, is also attached to the Beulah Centre, which also has Clifford Hall on its opposite side. Buckhurst Road is a busy thoroughfare that connects, via Upper Sea Road, Bexhill Old Town with Buckhurst Place, which contains a large triangular shaped mainly grassed area, near to what from is now Bexhill's town centre.

15. The land levels fall when travelling along Buckhurst Road towards the appeal site and Buckhurst Place. The Sanctuary, is clearly visible on this route, assisted by its partly diagonal alignment with Buckhurst Road. Its use of brick and sandstone detailing is also very similar to that on some of the other older buildings around Buckhurst Place; the Bank building; the Council Offices (said

to be grade ii listed); and the 'Warburtons' building. These buildings, along with The Sanctuary, collectively provide some distinctive design elements, that help to create a local identity for this area and the approach into and around Buckhurst Place. The Sanctuary's tower, which is notably lower than originally built without its spire (said to have been removed some 30-40 years ago) does positively add to the townscape quality, and its scale particularly against many other buildings nearby, assists with it being seen as a focal building, as a result its contribution to the townscape quality has a medium significance.

16. The broad form and appearance of The Sanctuary is reflective of its period of construction. Nevertheless, as the appellants rightly pointed out, it has been significantly altered since originally built, not least the additions of the Beulah Centre, and Buckhurst Room, the removal of the spire, internal changes including the removal of the organ, and the closing up of its front entrance onto Buckhurst Road.

17. The appellants have advised me that Historic England has issued an immunity from Listing for The Sanctuary, which is noted, although as the Council has indicated, the requirements for listing are quite different to the contribution a building can make as a NDHA. It is said that in assessing The Sanctuary, Historic England described it as being largely typical of many such buildings of the nineteenth century, and due to the alterations made it was of limited architectural interest and lacked cohesiveness. Based on my own observations, and the submissions from all parties, I am content that its architectural value is low due to the alterations that have been made to it, and with it being typical of many other such buildings of its time.

18. The appellants were clear at the event that the retention of The Sanctuary was investigated but found not to be feasible, and that it would require major alterations, nor did it meet their expectations of providing a much more environmentally friendly, open, and welcoming building. Whilst the Council disagreed and preferred its retention, there was no substantive evidence provided by the Council or any interested parties to fully justify why its retention is feasible. Moreover, neither Policies BX1 nor EN3 of the RLP require the appellants to justify why the buildings proposed for demolition could not be re-used in the first instance.

19. The Council stated that it assessed the significance of The Sanctuary against guidance said to have been prepared by English Heritage in 2008; stating it has a medium aesthetic value, high community value, a low evidential value, and a medium to high historic value. Although a copy of this guidance has not been provided, and its relevance in assessing the significance of NDHA's is unclear. Consequently, little weight can be attached to it, and it has not led me to conclude differently to my findings above.

20. Bexhill Heritage (BH) did not persuade me that the Beulah Baptist Church has a high architectural significance. Whilst it may have been built in a neo gothic style as part of the De La Warr's Estate, and it may have been the first tall building on this side of the railway line, much development has taken place since, including alterations to the building. Nor did I find that it makes any meaningful townscape contribution beyond that set out above regarding the approach to Buckhurst Place.

21. I conclude The Sanctuary has significance as a NDHA in terms of; its cultural value as a place of worship, which I regard to be of a medium to high

significance; its contribution as part of the townscape merit as a tall building in a distinctive style close to other similar such buildings on the approach to and around Buckhurst Place, which I regard to be of moderate significance; and its architectural significance as a relatively typical place of worship of its time, which due to the considerable alterations to it, I regard to be of low significance. As such, the loss of The Sanctuary would partly conflict with RLP Policy BX1, insofar as it seeks to conserve Bexhill's distinctive character.

22. Therefore, for the reasons set out above, and taking into account the collective significance of the NDHA, providing a replacement place of worship of an appropriate design and scale, which positively contributes to the character of the area, as required by RLP Policies BX1 and EN3 is secured, alongside any other relevant considerations, consistent with paragraph 209 of the Framework, the loss of the NDHA could be justified in this case. Nonetheless, this position will be dependent upon the outcome of the next main issue.

Character and appearance

23. The immediate area contains predominantly residential properties, in a variety of property styles, including gabled townhouses, semi-detached houses, and flats, some of which have flat roofs. The heights of the properties vary, including some two-storey properties, others are generally taller, many are buildings that contain flats that are three, four and five storeys high, which provides a degree of height to buildings in this immediate area. Despite their variety, the properties are generally setback from the pavement edge with landscaping or open areas between them and the pavement. The nearby properties are mostly clad in brick, with some also rendered, and there are some properties that feature sandstone detailing, whether in a paint finish or not.

24. It is acknowledged that the design of the new Church should not be a pastiche to a Victorian Church. The proposal is a modern and contemporary building, which the appellants said has replicated some of the distinctive elements of the Bank, and the Council Offices. It is clear that the appellants have carefully considered their approach to the Clifford Road elevation in light of the earlier appeal decision.

25. I was not persuaded by the argument from the appellants that the scale of The Sanctuary was only significant up to its existing eaves level. Its significant pitched roof above, which is clad in red tiles is a prominent feature that is seen above The Sanctuary's side walls from both Clifford Road and Buckhurst Road, it helps to convey its status and prominence as a place of worship. Whilst the proposed new Church with its dome roof, set in from its outer sides and its attached flat roofed glazed link, would have a similar eaves height to The Sanctuary, its two-storey scale would be more reflective of the modest height of the attached Beulah Centre, contrasting harmfully against the much higher mainly pitched roof residential properties nearest to the appeal site. Although the appellants said that its flat roof design allows the incorporation of environmentally sensitive features and that the buildings have been kept low in response to comments from adjoining residents, these aspects do not fully justify its diminutive scale, that would change how the hierarchy of buildings at the appeal site would be seen.

26. It is accepted that its dome roof, proposed to be clad in a standing seam copper material, would replicate a similar roof style on the Bank, providing a

distinctive feature that would be visible from both Clifford Road and Buckhurst Road, which may help to differentiate the building from others nearby. However, the proposed development's lack of scale and prominence, exacerbated by its relatively linear form along Clifford Road, would hinder it being distinguished as a Church.

27. The incremental use of sandstone on the proposal, progressing from the Beulah Centre towards Buckhurst Road, could be said to be representative of the relative cultural importance of these parts of the buildings. Notwithstanding that the external alterations and use of sandstone to the Beulah Centre could be seen as a minor improvement, its appearance would not relate well to the front facing gable on Clifford Hall, or to the proposed contemporary aspects on its other side. Whether it has opaque glazing or not, the glazed link would appear stark set against the mainly brick clad properties nearby, particularly the modern Beulah Centre, introducing an alien element that would not satisfactorily assimilate with the different parts of the existing building or the contemporary appearance of the proposed Church.

28. The proposed Church includes large heavy and bulky sandstone lintels on its Clifford Road elevation. Although it would have some vertical emphasis in its design, including its proposed pillars and by its use of materials, its bold use of the sandstone detailing harmfully contrasts with the existing building and the area, where sandstone detailing is more ornate. It is noted the appellants argue that the different uses of the building are reflected in the different designs of the complex of buildings. However, they fail to successfully unify the existing building and the proposed newer parts, creating an illegible form of development, that due to its relatively low and continuous length along Clifford Road would still have a strong horizontal emphasis, that would outcompete the overly contrived new vertical elements.

29. The proposed porch has been reduced from what was previously proposed, and its proposed copper roof would also relate well to its main roof material. Notwithstanding the existing buttresses and whether its location would open-up this area, the proposal would bring the building much closer to Clifford Road, and collectively the development and the protrusions beyond the existing building line, would disturb the generally established setback of buildings and arrangement of spaces between buildings and the pavement edge in this area.

30. The previous appeal decision found the tower to be the most successful part of the previous proposal and did not object to the expansive glazing on the Buckhurst Road elevation, as it provides important views into the building to help create an open and inviting place. I see no reason to disagree with those findings. Although, the Council's comments that the appearance of the tower could have been enhanced are agreed, perhaps being as tall, if not taller than the existing tower, and not as wide as proposed to increase its prominence. In addition, there could have been a greater use of red brick to emphasis the status of the building and make it more legible when travelling towards Buckhurst Place.

31. Overall, the scale of the building is somewhat underwhelming, particularly against the taller residential properties around it. Furthermore, its design approach, including the detail of its design and materials awkwardly relate to the Beulah Centre and Clifford Hall, creating a disjointed arrangement of

attached buildings, which is not assisted by some parts of the proposals that are closer to Clifford Road than the existing building.

32. I therefore conclude that the proposed development due to its scale and design would be harmful to the character and appearance of the existing building and the area, contrary to RLP Policies EN3 and BX1, that amongst other things, require new development to be of a high quality of design that conserves and enhances the distinctive character of the area. In addition, the proposal would also conflict with paragraphs 135 and 139 of the Framework, insofar as they require new development to add to the overall quality of an area, be visually attractive, sympathetic to local character and history, including the surrounding built environment, and for development that is not well designed to be refused.

33. I also find the proposal due to its inappropriate scale and design to be inconsistent with the key objectives of Policies I1, I2, I3, and C1 of the National Design Guide, dated January 2021, that collectively seek to ensure well-designed development that responds to local character and built context, including through its form and legibility, and by creating a new and positive character to enhance its identity.

Protected species

34. I saw on my site inspection that the buildings proposed for demolition have several openings, such as louvered vents, a tower structure, and a variety of roof forms and eaves detailing. Indeed, the PEA has identified numerous low-quality features, including exposed wooden rafters that can be suitable for bats.

35. The PEA states that the buildings proposed for demolition, together with the Beulah Centre, which is proposed to be altered, are identified as having a moderate suitability for bats and recommends further surveys (a minimum of two dusk bat emergence surveys) to establish if bats are present, which it is suggested could be a condition. However, given that the PEA did not initially assess the presence of bats at the appeal site, and given its conclusions about the buildings having a moderate suitability for bats, this 'recommendation' would not be a final check, but it would indeed be a survey of the buildings proposed to be demolished.

36. Paragraph 99 of Circular 06/2005 is clear that a precautionary approach should be taken in respect of protected species, and surveys should be undertaken prior to the grant of planning permission, to take full account of the presence of protected species, which are an important material planning consideration.

37. The appellants very recent statement in respect of bats[2], advised that a dusk bat emergence survey of the appeal site was undertaken on 10 July 2024 and a further survey is planned for 20 August 2024. It further states that no evidence of bats was found during the first survey, and in the opinion of the ecologist it is unlikely that bats are to be found on the second survey. It is, however, said that if bats are identified or suspected on the second dusk emergence survey, a third such survey would be required. It is suggested that the additional emergence survey(s) could be required as a condition should the appeal be allowed, together with other precautionary actions to protect bats that may be

[2] From Arborweald Environmental Planning Consultancy, dated 16 July 2024

using the appeal site. Although, no copy of the first bat survey has been provided.

38. I acknowledge there is no dispute between the main parties on this issue, and an agreed pre-commencement condition has been suggested to address the second survey, along with any further surveys and mitigation that may be necessary. However, mindful of the recommendation of the PEA for two dusk emergence bat surveys to establish the presence of bats, and the clear stated guidance within paragraph 99 of circular 06/2005, it is apparent that it has not been fully evidenced through surveys that bats are not using the appeal site. As such, and with this being an important material consideration, I am unable to make an informed decision about the effect of the proposal on protected species, including assessing whether any mitigation measures would adequately safeguard or compensate bats, and how they could affect the character and appearance of the building and the appeal site.

39. In addition, the agreed condition, requiring at least a further dusk emergence survey together with any mitigation, would not meet the tests for conditions as set out in paragraph 56 of the Framework in this case, as it would not be reasonable or precise. This is because the exact number of bat surveys required would not be known without the second survey being undertaken first, and any potential effects of bat mitigation, would also be unknown, which could potentially affect the external appearance of the proposals.

40. The PEA did not identify any other unacceptable effects upon protected species. Had I been minded to allow the appeal, the PEA's recommended mitigations for breeding birds, along with measures to prevent bonfires at the appeal site, and address construction waste, could have been addressed by a suitably worded planning condition.

41. I therefore conclude that there is insufficient information to fully assess the effects of the proposed development upon protected species, notably bats, contrary to RLP Policy EN5 and Policy DEN4 of the Development and Site Allocations Local Plan, adopted December 2019 (DSA) which amongst other things, collectively seek to protect, conserve and enhance biodiversity. In addition, and for the same reasons the proposal would also be contrary to paragraphs 180 and 186 a) of the Framework, which states that development should contribute to and enhance the natural and local environment, and planning permission should be refused where significant harm to biodiversity cannot be avoided.

Other Matters

42. The appellants Community Involvement Statement sets out the range of the community work and uses at the appeal site. In addition, at the event the appellants also outlined the extensive community benefits of the existing operations at the appeal site, and how the proposed development would increase their capability to significantly expand them and provide a modern purposefully built Church. It was also clear that the appeal site is more than a place of worship, and that it reaches into the community as an enabler for local services, and along with its partner organisations provides important local services. I was also made aware of some of their community work, including with Ukrainian migrants, mental health, and the important services they provide to vulnerable members of the community.

43. In addition, I have had regard to a large number of representations received from interested parties, expressing their support for the proposed development in addition to the above points, which are by no means exhaustive, and include the following: that the proposal would provide a sustainable building for future generations with improved accessibility; the poor condition of The Sanctuary; and the economic, social and environmental benefits associated with its re-development. An interested party has also made me aware that the proposed re-development of The Sanctuary will provide enhanced access and usability for persons with a range of disabilities.

44. The benefits of the proposal are not disputed by the Council, which it is said were considered when it determined the planning application. Although, I am not aware that The Sanctuary or the Buckhurst Room is under threat from closure because of their current condition, or that any planned community uses are proposed to cease because of it. Furthermore, many of the community uses are said to take place within the Clifford Room and Beulah Centre, which are to be wholly retained. Therefore, the weight I can give to the stated benefits collectively, over and above those that take place already and do not appear under threat, is somewhat tapered and largely limited to the enhanced provision of community uses. I regard these to constitute moderate weight in favour of the proposal.

45. The appellants have provided details of the proposed environmentally sustainable design aspects of the proposal, which is also set out within their supporting statement. Although, it was clear at the event that the appellants are not proposing to construct the proposed development to specific recognised environmental standard. As such, their actual effectiveness and the overall sustainability of the proposed development would not be certain or measured to a recognised benchmark. Nevertheless, these environmentally sustainable features would to a limited extent weigh in favour of the proposal.

46. It is noted that a Prior Approval has been allowed[3] for the demolition of the entire complex of buildings at the appeal site, including the Beulah Centre and Clifford Hall. However, there is no evidence that this is likely to occur, particularly because; it has been said that there has been a recent £400,000 refurbishment of the Beulah Centre; the important community uses collectively taking place within the buildings at the appeal site; and given the numbers of worshippers said to be attending Church services. Whilst this prospect of complete demolition cannot be discounted, it appears unlikely to occur based on the information presented within written submissions and at the event. Moreover, this application specifically seeks to retain the Beulah Centre and Clifford Hall. I therefore attach limited weight to this as a realistic fall-back position.

47. I have also had regard to objections received from residents and others, expressing concerns in addition to the main issues above, relating to parking and highway safety, including during construction works. However, I note that these matters were considered where relevant by the Council when it determined the planning application. Whilst I can understand the concerns of the interested parties, there is no compelling evidence before me that would lead me to come to a different conclusion to the Council on these matters.

[3] Ref. RR/2020/1428/DN

48. The appellants referred to the planning history associated with the appeal site, including the 4 no. requests for pre-application advice (with no response said to have been received to the last request). Whilst I can appreciate the appellants comments regarding how they have sought to engage with the Council, I do note that no pre-application advice was sought following the dismissal of the previous appeal[4] and before their submission of this proposal. I have had due regard to the planning history of the appeal site insofar as it is relevant to the appeal proposal, however it has not altered my findings as set out above.

49. The prospect of re-purposing The Sanctuary has been raised by some parties. The appellants advised that it would not be a viable proposition, although the Council is of the view that they have not seen any evidence of the feasibility of its re-purposing. Whether this was discussed as part of the earlier pre-application enquiries as the appellants say or not, the Council have not specifically raised the viability of the conversion of the existing building within the SoCG, nor has it sought to provide any substantive evidence to dispute what the appellants have said. Based on the evidence before me, I have no reason to disagree with the appellants view regarding its re-use being unviable.

50. The issue of the sustainability of building materials has been raised. I note that this was not part of the matters in dispute between the parties as set out within the SoCG. Based on the information before me, I also found no such conflict with the policies of the development plan that are most relevant to the appeal proposal.

51. BH made me aware that they are currently surveying the area around the appeal site, to try and justify it being part of a designated Conservation Area. Be that as it may, the site as it stands is not within a Conservation Area, and I have no certainty that such work would find a designation of the area justified.

Planning Balance and Conclusion

52. The community benefits associated with the proposed development, as set out above, provide clear public benefits, of which I attribute moderate weight, particularly given that some of them are already undertaken from the Beulah Centre and Clifford Hall, and there appears to be no threat to them continuing in the event the appeal was to be dismissed. There would also be some economic benefits associated with the construction of the scheme, although these would be temporary and are likely to be limited.

53. In addition, there would also be environmental benefits through its use of environmentally sustainable design features, however, it was said the proposal would not be built to any recognised sustainable building standard, and it is uncertain based on the information provided how effective these would be, as such this aspect attracts limited weight in favour of the proposal. It is also acknowledged that the entire complex of buildings at the appeal site could be demolished, however this appears very unlikely to occur based on the appellants evidence, although this possibility does to a small extent weigh in favour of the proposal. I recognise that no other harm has been found other than that outlined in the main issues above, although this is a neutral factor that neither weighs in favour or against the proposal.

[4] Appeal Ref: APP/U1430/W/21/3284583

54. Whilst I have found that the loss of The Sanctuary as a NHDA could be acceptable subject to the acceptability of its replacement, the proposed development does not positively contribute to the character and appearance of the existing complex of buildings and the surrounding area. I have also identified harm to protected species. Accordingly, there is conflict with the development plan when taken as a whole, and there are no other material considerations, including those outlined above, that indicate the appeal should be determined otherwise. The scheme also fails to accord with the requirements of the Framework.

55. For the reasons given above, I conclude that the appeal should be dismissed.

A Hunter

INSPECTOR

APPEARANCES

FOR THE APPELLANTS:

Philip Winch RIBA MCI Arb	CPL Architects – Managing Director
Paul Burgess MRTPI	Lewis & Co Planning Consultants
Reverend David Lockwood	Minister – Beulah Baptist Church

FOR THE LOCAL PLANNING AUTHORITY:

Rossella De Tommaso BA(Hons) MSc	RDC - Senior Planning Officer
Simon Richards PG Dip Bldg Cons IHBC	RDC - Conservation Officer
Matthew Worsley	RDC - Major Applications Team Leader
David Chambers BSc(Hons) MA RCA PGCert ARB	RIBA, RDC - Design Team Leader
Deborah Gardner PG Dip (Bldg Cons) IHBC	Heritage Consultant

INTERESTED PARTIES:

Cllr Christine Bayliss	RDC - Central Ward
Cllr Andrew Crotty	RDC - Bexhill Central Ward
Viv Taylor-Gee	Bexhill Hub - Coordinator
Steve Johnson	Bexhill Heritage - Chairman

DOCUMENTS SUBMITTED AT THE HEARING

Letter supporting the proposal, dated 23rd July 2024, from Mrs A Hammill, Head Teacher, St Peter & St Paul Church of England (VA) Primary School.

DOCUMENTS SUBMITTED AFTER THE HEARING

Copy of Appendix 4 referred to within Policy EN3 of the Rother Local Plan, Core Strategy, adopted September 2014, provided by email on 26/7/2024.

Copy of the main parties agreed wording for suggested condition 11 (bats) and additional condition 12 (ecological enhancements), provided by email on 26/7/2024.

Appendix O

PINS Decision in respect of APP/X2410/W/23/3318405

The Planning Inspectorate

Appeal Decision

Site visit made on 19 December 2023

by K Savage BA(Hons) MPlan MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 January 2024

Appeal Ref: APP/X2410/W/23/3318405
Land South East Of Mill House, Mill Lane, Syston, Leicester LE7 1NS

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
- The appeal is made by Mr James Vernon (JJ Scaffolding Ltd) against the decision of Charnwood Borough Council.
- The application Ref P/21/1925/2, dated 27 August 2021, was refused by notice dated 2 February 2023.
- The development proposed is change of use of agricultural land to a mixed use for storage or distribution and general industrial purposes (Use Classes B2 and B8), retention of hard-surfacing works and metal fencing.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appeal is made on a partly retrospective basis, with hard surfacing and perimeter fencing having already been installed. The change of use has not commenced and I have considered this as a proposed element of the scheme. During the application, a proposed open sided storage building was removed from the plans and the site area was extended to include the adjacent field to the south-east of the site as an area for ecological mitigation. Therefore, I have used the description from the decision notice which reflects the extent of development upon which the Council ultimately made its decision.

3. A new version of the National Planning Policy Framework (the Framework) was published on 19 December 2023. The parts of the Framework most relevant to the appeal have not substantively changed from the previous iteration. Consequently, this update does not fundamentally alter the main parties' cases, and it is not necessary to seek further comments. References hereafter in the decision to the Framework are to the December 2023 version.

Main Issues

4. The main issue in this case is whether the proposal represents a suitable location for the development, having regard to local and national policies relating to i) flood risk; ii) the character and appearance of the area and iii) development in the countryside.

Reasons

Site Context

5. The appeal site is located towards the end of a rural lane that terminates at a collection of buildings and open storage areas in use by a range of industrial

businesses, many related to car sales and repairs. The immediate area is surrounded on the north-western side by the River Wreake and to the east by a raised railway line. Aside from these features, the cluster of industrial uses are surrounded by open fields forming part of the wider countryside around Syston.

6. The site includes Mill House which has recently been renovated. In addition, since purchasing the site in 2021, the appellant has undertaken clearance of vegetation, laid aggregate to create a hardstanding and erected steel fencing to the perimeter of the site, which extends to some 2,158 square metres. A bund has been created to the north-eastern side of the side next to a stream tributary of the River Wreake.

7. The site is proposed to be used by the appellant for his scaffolding business to load and unload scaffolding lorries with poles, boards and other equipment. The appellant states that storage of materials and vehicles on site would be occasional at most.

Flood Risk

8. The development plan for the area comprises the Charnwood Local Plan Core Strategy (2011-2028) (November 2015) (the CS) and saved policies of the Borough of Charnwood Local Plan 1991-2006 (January 2004) (the BCLP). I have also noted reference to draft policies of the emerging Charnwood Local Plan 2021-2037 (the eCLP), which are afforded limited to moderate weight by the Council depending on the level of unresolved objection.

9. Policy CS16 of the CS seeks to ensure that new development is not at risk of flooding and that it does not cause flood risk elsewhere. The policy is consistent with the Framework, which indicates that a sequential approach should be used in areas known to be at risk from any form of flooding. The Planning Practice Guidance (PPG) states that for the purposes of applying the Framework the 'areas at risk of flooding' are principally land within Flood Zones (FZ) 2 and 3. The aim of the sequential test is to steer new development to areas with the lowest probability of flooding, these being within FZ1.

10. The Framework is clear that the sequential test should consider flooding from any source. Only where there are no reasonably available sites in FZ1 should reasonably available sites in FZ2 be considered. If the sequential test demonstrates that it is not possible for development to be located in zones with a lower risk of flooding, then the exception test may have to be applied.

11. The Council's Level 1 Strategic Flood Risk Assessment (December 2018) (SFRA) identifies the appeal site as lying within Flood Zone (FZ) 3b Functional Floodplain. This is defined in the SFRA as 'land where water has to flow or be stored in times of flood' and it is stated that only water compatible and essential infrastructure[1] will be permitted in this zone.' The Environment Agency (EA) has re-affirmed the status of the site as being within FZ3b as detailed hydraulic modelling has shown the site is impacted by the 1 in 5 year event (20% Annual Exceedance Probability (AEP)), which far exceeds the AEP of 3.3% used to define the Functional Floodplain under the Planning Practice Guidance (PPG).

12. The appellant has undertaken a sequential test which considered employment sites identified in the Charnwood Strategic Housing and Economic Land

[1] Which has passed the Exception Test

Availability Assessment 2020 and sites marketed on property websites. The identified sites are discounted for reasons of unavailability, size, unsuitability for the proposed use or having similar levels of flood risk. The Council has not specifically challenged the sequential test; however, I note that the test includes sites which are within Charnwood district but some distance from the appeal site, such as at Loughborough or Shepshed, but conversely it does not take in closer locations such as the northern reaches of Leicester. Indeed, given the appellant's indication that his business was formerly operating within Leicester, it is unclear why the sequential test has not considered other potential sites in the city. Given the extent of this nearby urban area, and the likely presence of several industrial areas whose suitability has not been considered, I am not satisfied that the sequential test has been passed.

13. However, this aside, the PPG sets out that within FZ3b only 'water-compatible' development is permitted. This is defined in the Framework and relates to development which must functionally be located close to water. It does not include general industrial or commercial uses. The appellant's flood risk assessment (FRA) accepts the majority of the site is within FZ3b, but argues that the laying of permeable hardstanding should be regarded as 'water compatible.' This is despite the appellant's sequential test acknowledging that the proposed use of the site, for storage and parking of lorries overnight, falls within the 'less vulnerable' category. The Council, supported by the EA, argues that the development should be considered as 'less vulnerable,' being similar to a car park which is so defined under the Framework.

14. Having regard to the Framework definition of 'water compatible' development, I find the proposed use does not fall within this category and I agree with the Council and EA that it should be regarded as being within the 'less vulnerable' category. The PPG at Table 2 of the Flood Risk and Coastal Change chapter clearly states that less vulnerable development should not be permitted in FZ3b. Therefore, even if I were to accept the appellant's position that no other sequentially preferable sites exist, the proposal would still represent development which is inappropriate in principle within the functional floodplain.

15. The risks of permitting such development within FZ3b are evident. The AEP of the site is exceptionally high at 20%, and therefore it is at significant risk of frequent flooding. Whilst the appellant points to the hardstanding being permeable and to the erection of a bund alongside the stream, the EA points out that bunding has the effect of reducing the area over which water is able to naturally flow and be stored in times of flood, thereby reducing floodplain capacity. A consequence of this is an increased risk of flooding frequency, depths and hazard rating to other areas, for flood flows to divert elsewhere and for the extent of flooding to increase. The EA also points to the risk of the fencing, vehicles and materials that would be stored on site being washed away and causing blockages downstream, damaging flood defences and adding to flood risk elsewhere. Such risks are palpable and the frequency with which flooding could occur on site only adds to this risk.

16. I have had regard to potential conditions advanced by the appellant within the sequential test; however, these would not wholly mitigate the risks identified by the EA, particularly the reduction in floodplain caused by the bunding.

17. Therefore, due to the nature of the use and works on site, I conclude that the proposal would represent an unacceptable form of development within FZ3b

which would increase the risk of flooding elsewhere. It has also not been satisfactorily demonstrated that the proposal could not be suitably accommodated in an area at lower risk of flooding. The proposal would therefore conflict with Policy 16 of the CS, the similar approach of draft Policy CC1 of the eCLP, the approach of the Framework in respect of flood risk and the associated guidance of the PPG. There would also be subsequent conflict with Policy CS2 of the CS which requires developments to function well and add to the quality of an area over the lifetime of the development and to reduce their impacts and be resilient to the effects of climate change in accordance with Policy CS16.

Character and Appearance

18. Aerial photography from the Council shows that, as recently as 2020, the site was undeveloped grassland forming part of a larger field extending to the south-east. The 2021 image shows hardstanding was introduced, with the bunding and perimeter fencing added at the same time or some point thereafter. On site, I saw that a line of coniferous trees has been planted to the south-eastern boundary.

19. The evidence before me shows that the site, despite being adjacent to an established industrial area, clearly formed a contiguous part of the undeveloped countryside. The introduction of the hardstanding and fencing has effectively extended the industrial estate further along Mill Lane on one side.

20. The open nature of the site and tall security railings lends it an unmistakably industrial appearance. The introduction of the tree line to the south-eastern boundary does provide a screen that will improve over time as the trees mature, which would limit the visual impact of the site for walkers using the public footpath which crosses the adjacent field. However, the boundary would have a somewhat artificial appearance due to the straight tree line and the coniferous species used, which would be indicators of development behind.

21. The open site with parked vehicles and materials would also be visible from Mill Lane itself. I accept that the existing industrial development is a visible feature at the terminus of the view along the lane and a significant part of the immediate character, and that the use of the site, being comparable to the neighbouring industrial uses, would not stand out as an isolated form of development. However, these uses, whilst longstanding, offer little by way of visual amenity and represent an isolated cluster of development which is not intrinsically linked with the rural economy and is inconsistent with the character of the wider rural surroundings. The expansion of the industrial area in the manner proposed would add to its scale and prominence and exacerbate this inconsistency.

22. In reaching a view, I afford limited weight to the arguments that the site had no rural function and detracted from the visual amenity of the area. Whilst it may have included some unkempt areas, it was overwhelmingly natural in appearance and provided a soft edge between the industrial uses and the open countryside, whilst also fulfilling a role as part of the functional floodplain. The proposal would diminish its contributions in both these respects.

23. I acknowledge that the enclosed nature of the surroundings means the site would not have a significant adverse effect on the wider landscape in this area. However, for the reasons set out, I conclude that the proposal would cause

localised harm to the character and appearance of the area. This would conflict with Policies CS2 and CS11 of the CS, and relevant parts of Saved Policies CT/1 and CT/2, which together require new development to respect and enhance the character of the area; protect landscape character; reinforce a sense of place and local distinctiveness and not have significant adverse environmental effects. There would also be conflict with the similar aims of draft Policies DS5 and EV1 of the eCLP.

Development in the Countryside

24. The site lies within the countryside for the purposes of the development plan. Policy CS1 of the CS seeks to direct development to the most sustainable locations through a settlement hierarchy. The appeal site is not located in any of the identified settlements under Policy CS1 or under the proposed spatial strategy of draft Policy DS1 of the eCLP.

25. Policy CS10 relates to rural economic development and supports the sustainable growth and expansion of businesses in rural areas. The proposal in this case does not relate to a new business, but would involve the relocation of the appellant's business from a site within the administrative area of Leicester City Council. As such, the proposal would not enjoy support under Policy CS10, which otherwise directs development to allocated employment land in service centres.

26. Moreover, the proposal would not be a form of development supported in the countryside under Saved Policy CT/1. Nor would the proposal accord with draft Policy E3 of the eCLP as it would not represent the expansion of an existing business in a rural area through either conversion of existing buildings or well-designed new buildings and, as set out above, it would be detrimental to the character and appearance of the countryside.

27. I recognise that the Framework supports the sustainable growth and expansion of all types of business in rural areas, and that that sites to meet local business and community needs in rural areas may have to be found adjacent to or beyond existing settlements, and in locations that are not well served by public transport. The appellant has pointed out that the use, being one which generates noise and regular vehicular movements, is better located away from residential areas, is not suitable for office parks and does not need to use buildings as may be found in established industrial estates.

28. I acknowledge that the use may not be conducive to a wholly residential area, but neither is it a use which must locate in the countryside for operational reasons, as it is not related to agriculture or another land-based enterprise. I have already found the alternative sites identified in the sequential test to be insufficient to demonstrate this is the only suitable site, and beyond the fact that the appellant owns the land and seeks a permanent, freehold site for his business, no further evidence has been adduced to show that this is the only possible location and that there are no other sites located in more accessible locations within or adjacent to an existing settlement which do not involve incursion into the open countryside, as required by saved Policy CT/1.

29. Reference is made to the lawful use of the land being unclear, the appellant stating that some hardstanding existed when the site was purchased in 2021. However, I have no clear evidence of the land being put to a specific use and the aerial photography from the Council indicates that any hardstanding was

over a limited area adjacent to Mill House, and in no way comparable to the extent of hardstanding since laid. In any event, the description of development refers to the change of use of agricultural land and, absent evidence to the contrary, I have considered the appeal on that basis.

30. I note the argued benefits of the proposal in terms of securing employment for 22 people and from the 'clustering' of similar business allowing sharing of resources and staff. However, given the indications that the business is well-established, and indeed growing, these jobs would not all be newly created, nor is the evidence persuasive that these jobs would be in jeopardy should permission be refused. There is also no tangible evidence of the extent of benefits arising from the described 'clustering effect' with another scaffolding business. Therefore, I afford only limited weight to these argued benefits.

31. Overall, due to the location of the site within the open countryside and the identified harm from increased flood risk and adverse effect on the character and appearance of the area, the proposal would conflict with the spatial strategy as set out across Policies CS1, CS10 and Saved Policies CT/1, CT/2 and ST/2 in terms of locating development in the countryside. There would also be conflict with the similar aims of draft Policies DS1, C1 and E3 of the eCLP.

Other Matters

32. The site area was extended during the course of the application to take in the adjacent field to the south-east. The area is described as predominantly semi-improved grassland, with encroaching areas of tall ruderal vegetation, dense and scattered scrub. The area now covered by hardstanding was also assessed as such. The appellant proposes to mitigate the loss of this area of grassland through biodiversity enhancements to the remainder of the site, namely a programme of native species rich scrub planting.

33. However, the appellant's Ecology Technical Note[2] appears to show a net loss in terms of habitat impacts. The appellant concedes that the proposal would not result in a net gain in biodiversity, but that the approach has been agreed with the Council's biodiversity consultee as being a realistic option for the land in question. I have no further evidence to clarify this matter, but even if I were to accept the appellant's position, the outcome is no better than neutral in terms of biodiversity, with no net gain weighing in favour of the proposal.

34. The Council did not refuse the application in respect of the effect on highway safety. Having considered the evidence before me, I have no reasons to conclude differently. However, this is similarly a neutral matter in the overall planning balance.

Planning Balance and Conclusion

35. The proposal fails to satisfy national flood risk policy in terms of the sequential location of development. It would also cause harm to the character and appearance of the area and would not represent a form of development supported in the countryside. This would result in conflict with the development plan as a whole and with the objectives of sustainable development set out in the Framework. I give significant weight to the development plan conflict given the relevant policies are generally consistent with the Framework.

[2] Appendix B: BIA Summary

36. The conflict with the Framework in respect of flood risk means that, per Paragraph 11(d)(i) and Footnote 7, the presumption in favour of sustainable development, i.e. the 'tilted balance', is not engaged despite the policies of the development plan being more than five years' old, but rather points to development being refused.

37. The proposal would give rise to benefits to the local economy through retaining local employment by the business, though as it has not been demonstrated that this is the only feasible location for the business to locate, this limits the weight I afford to this benefit, as does the fact that in delivering this benefit the development would simultaneously introduce demonstrable flood risk. Other matters, for reasons set out, attract neutral or very limited weight.

38. In my judgement, the benefits of the scheme would not amount to material considerations which would outweigh the identified significant conflicts with the development plan and the Framework. Consequently, they would not justify a decision being made other than in accordance with the development plan, taken as a whole.

39. Therefore, I conclude that the appeal should be dismissed.

K Savage

INSPECTOR

END OF

STATEMENT OF CASE

on behalf of

Charnwood Borough Council

in respect of a Planning Appeal made under Section 174
of the
Town and Country Planning Act 1990

by:

Wealth Property Ltd & Mr Asphal Singh Babbar

against an enforcement notice served by Charnwood Borough Council:

Without planning permission the material change of use of land and buildings, from industrial and agricultural use to sui generis use including industrial, agricultural, residential (building conversion and caravan), vehicle sales, MoT station, vehicle repairs and servicing, vehicle restoration, vehicle body repairs, storage, tyre fitting, siting of caravans and portable structures/ buildings, storage, manufacturing and retail; and facilitating development including the installation of fencing, hardstanding, closed circuit television, lighting, and ground works.

at

Land at Syston Mill, Mill Lane, Syston, Leicestershire, LE7 1NS

PLANNING REFERENCE: E/21/0183

APPEAL REFERENCE Nos.: APP/X2410/C/24/3354976 & APP/X2410/C/24/3354977