



# Legal Services

## MEMORANDUM

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From: Kathryn Harrison  
To: Nicola Ford  
Our ref: 1090.1313 (P/21/2673/2)  
Date: 13 October 2022

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### **CLEUD: for engineering works comprising the releveling of the land**

The above application, dated 23 December 2021, was referred to Legal Services for determination on 07 February 2022 and comprises an application pursuant to s.191 of the Town and Country Planning Act 1990 for a Certificate of Lawful Use in respect of the land known as land off Moor Lane, Loughborough, Leicestershire LE11 1FR (Planning reference P/21/2673/2).

### **Application**

On the application form, the description of existing use, building works or activity is stated to be:-

“Engineering works comprising the releveling of the land”

And that a certificate should be granted because:-

“The building works (for instance, building or engineering works) were substantially completed more than four years before the date of this application”.

The date the building works were substantially completed is stated on the form as being 01 October 2017.

### **Evidence in Support**

In addition to the details set out in the application form, the Applicant has submitted:-

1. Site Location plan
2. Statutory Declaration by Roy David Coley, dated 23 December 2021
3. Legal Submission from Howes Percival LLP, dated December 2021

4. Photographs of site dated 04/2016 and 03/2015
5. Google Earth satellite images dated 2011, 2015, 2016, 2019
6. E-mail from Agent dated 19 August 2022 enclosing
  - a. Existing Site Plan, dated 27 July 2018
  - b. Meeting Agenda 06.09.19
  - c. E-mail from the Council dated 30.07.2019 regarding E/180476
7. E-mail from Agent dated 30 September 2022 enclosing an updated site survey Plan, titled "Site Coordinates" and dated 27 September 2022

### **Evidence to Counter**

1. Council's Site Photos various dates between 15 May 2019 and 16 June 2019
2. Topo Plan received by the Council on 18 June 2021 for Planning Application P/21/0476/2

### **Other Information held by the Council**

1. Site Planning history/constraints – Planning Permission P/12/2130/2 and Planning Application P/21/0476/2

### **Determination and Decision**

#### **Legislative Background**

Section 191 of the Town and Country Planning Act 1990 refers to Certificate of Lawfulness of Existing Use or Development. Subsection (1) advises that "If any person wishes to ascertain whether any operations which have been carried out in, on, over or under land are lawful he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter."

Subsection 2 advises that "for the purposes of this Act uses and operations are lawful at any time if—

- (a)no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
- (b)they do not constitute a contravention of any of the requirements of any enforcement notice then in force."

No enforcement action has been taken in respect of the application site.

Subsection 4 advises that if, “on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the operations, they shall issue a certificate to that effect; and in any other case they shall refuse the application.”

Subsection 5 advises that “a certificate under this section shall—

- (a) specify the land to which it relates;
- (b) describe the use, operations or other matter in question (in the case of any use falling within one of the classes specified in an order under section 55(2)(f), identifying it by reference to that class);
- (c) give the reasons for determining the use, operations or other matter to be lawful; and
- (d) specify the date of the application for the certificate.”

### **Considerations**

The applicant is required to demonstrate that the operations described in the application were substantially completed more than 4 years before the date of the application.

In assessing the submitted evidence, the LPA needs to be mindful of the national Planning Practice Guidance (Lawful Development Certificates (LDC)) (Para 005 & 006), which state:

*“An application needs to describe precisely what is being applied for (not simply the use class) and the land to which the application relates”*

*“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 application form states that a certificate is sought for “engineering works comprising the releveling of land” and is accompanied by a site location plan. The application form and statutory declaration advise that the works were substantially completed by 01 October 2017 and that the only further works to be carried out on the site since are the creation of a bund and removal of a spoil heap.

Initially no information was submitted with the application to identify the level of the ground as a result of the development so the extent of the development applied for was unclear. However the Applicant’s Agent has since submitted an Existing Site Plan dated 27 July 2018, showing the spot heights across the site at that time. If a certificate was to be granted this Existing Site Plan could have been attached or referred to in the certificate, to ensure the development was described with sufficient clarity and precision.

However, the Council's Planning Enforcement Team have visited the site since October 2017 and consider the releveling to have continued to take place after this date. Photographs taken by officers during site visits in May and June 2019, show notable mounds of earth and spoil still present on the land and areas of cut/terracing.

Google Earth satellite images of the land covering a number of years from 2011-19 are also submitted with the application. These images show, from an aerial perspective, the land appearing as a level site on the 2019 image but not on the 2016 image. It is noted though that the 2019 image is dated September 2019 and the ground appears on this image to be bare ground with very little vegetation, which could accord with the officer's view from their site visits, of releveling works still being undertaken in May/June of that year.

The original ground levels across the site were surveyed for planning application reference P/12/2130/2. There is no evidence submitted with this CLEUD application to show the site levels in October 2017, however, the Agent has submitted the July 2018 survey plan (titled "Existing Site Plan") which shows the site levels to have been raised noticeably since the 2012 planning application's site survey. Furthermore, comparing the Existing Site Plan with the "Topo Plan" that was submitted in respect of a recent planning application relating to the site (reference P/21/0476/2), suggests the ground levels to have been raised again by a further half to one metre across much of the site, between these two surveys being undertaken. This further increase in site levels was queried with the Applicant's Agent and in response the Applicant arranged for a new site survey to be undertaken. The Agent has submitted a further levels plan following a laser survey of the site carried out in September 2022. This survey shows the levels across much of the site to be lower than measured on the 2021 Topo Plan but still well above both the original site levels and above the levels on the July 2018 Existing Site Plan.

The legal submissions submitted in support of the application do acknowledge that further ground works have been carried out on the site since October 2017 to create a security bund and remove a spoil heap. The supporting submissions consider that those works were not part of the Development (described at paragraph 1 of the submission as being the "releveling of the land") so not relevant to the consideration of whether substantial completion has occurred. However, case law<sup>1</sup> has held that a holistic approach should be taken in considering what amounts to "substantial completion", described as meaning that "regard should be had to the totality of the operations which the person originally contemplated and intended to carry out"<sup>2</sup>. It seems probable that the Applicant, when embarking on works for the "releveling of the land", intended the finished result of the work to be a cleared level site. It would be disingenuous in considering when works were substantially completed, to separate some ground works required for achieving a levelled site, or that would result in the further changing of ground levels, from others. The ground works undertaken prior to 2017 and continuing afterwards appear to be part of one continuous operation.

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<sup>1</sup> Sage v Secretary of State for the Environment, Transport and the Regions and another [2003] 1 WLR 983

<sup>2</sup> Sage v Secretary of State for the Environment, Transport and the Regions and another [2003] 1 WLR 983

Given the evidence of the continued raising of ground levels and ground works being undertaken at the Site since 2018, it is not agreed that the development this CLEUD application applies for (the releveling of the land) had been substantially completed for more than four years before the date of the application.

**Decision**

Consequently, having reviewed the evidence I am not satisfied on the balance of probability that the applicant has discharged the required burden of proof, in order for the application to be granted approval.

In the particular circumstances of this case, it appears appropriate that a certificate should not be granted and a draft refusal notice is attached, to be issued under the delegation to the Head of Governance & Human Resources (Council Functions – paragraph 6, p8-13” to determine applications for Certificates of Lawfulness for proposed or existing uses or development”).

**Officer making recommendation**

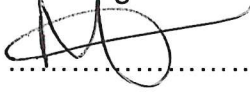
Kathryn Harrison  
Principal Solicitor

Signed: ..... *K. Harrison* .....

Dated: ..... 13.10.2022 .....

**Officer approving recommendation**

Nicola Ford  
Legal Services Manager

Signed:  .....

Dated: 14-10-2022 .....

