

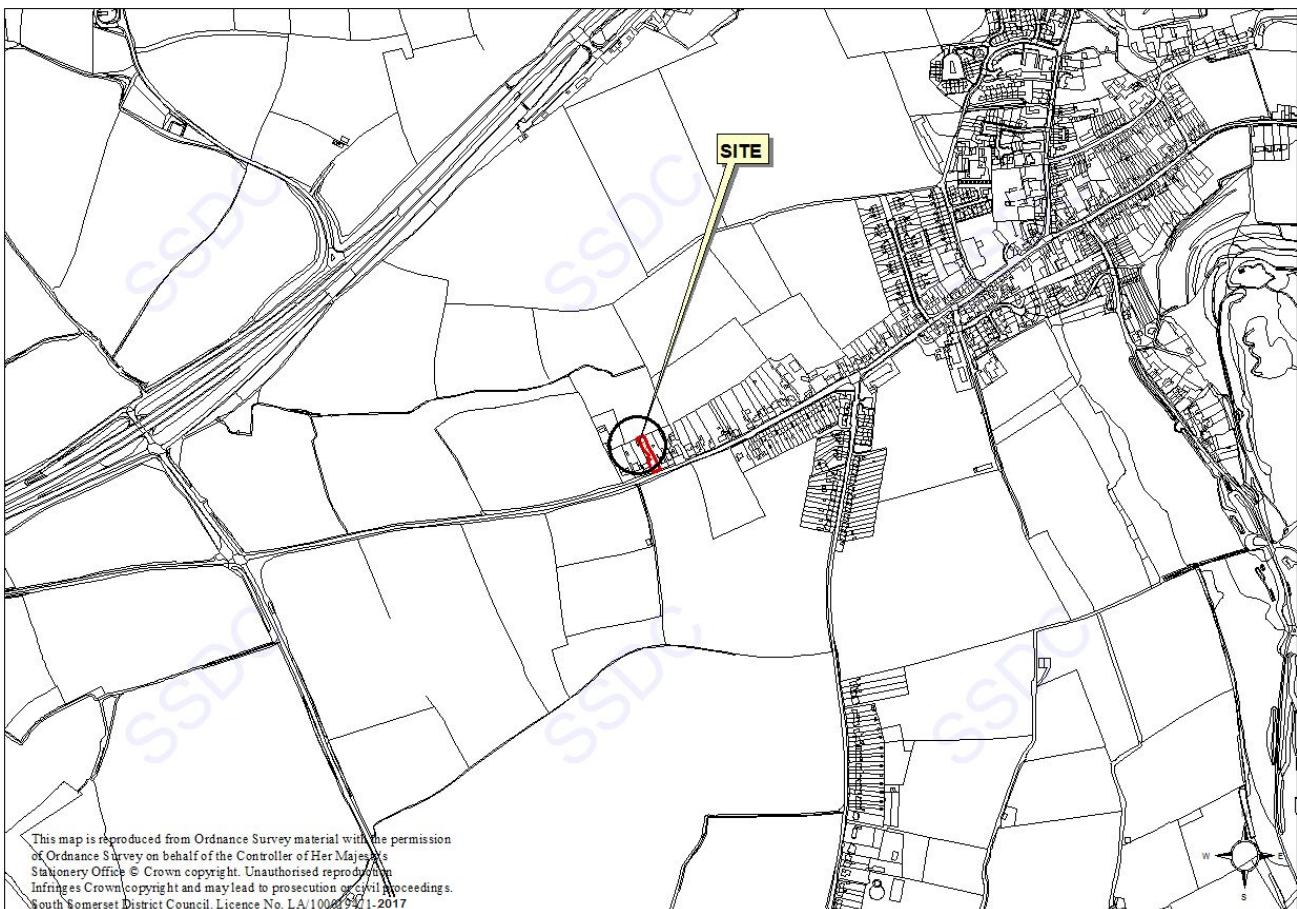
Officer Report On Planning Application: 17/01632/COL

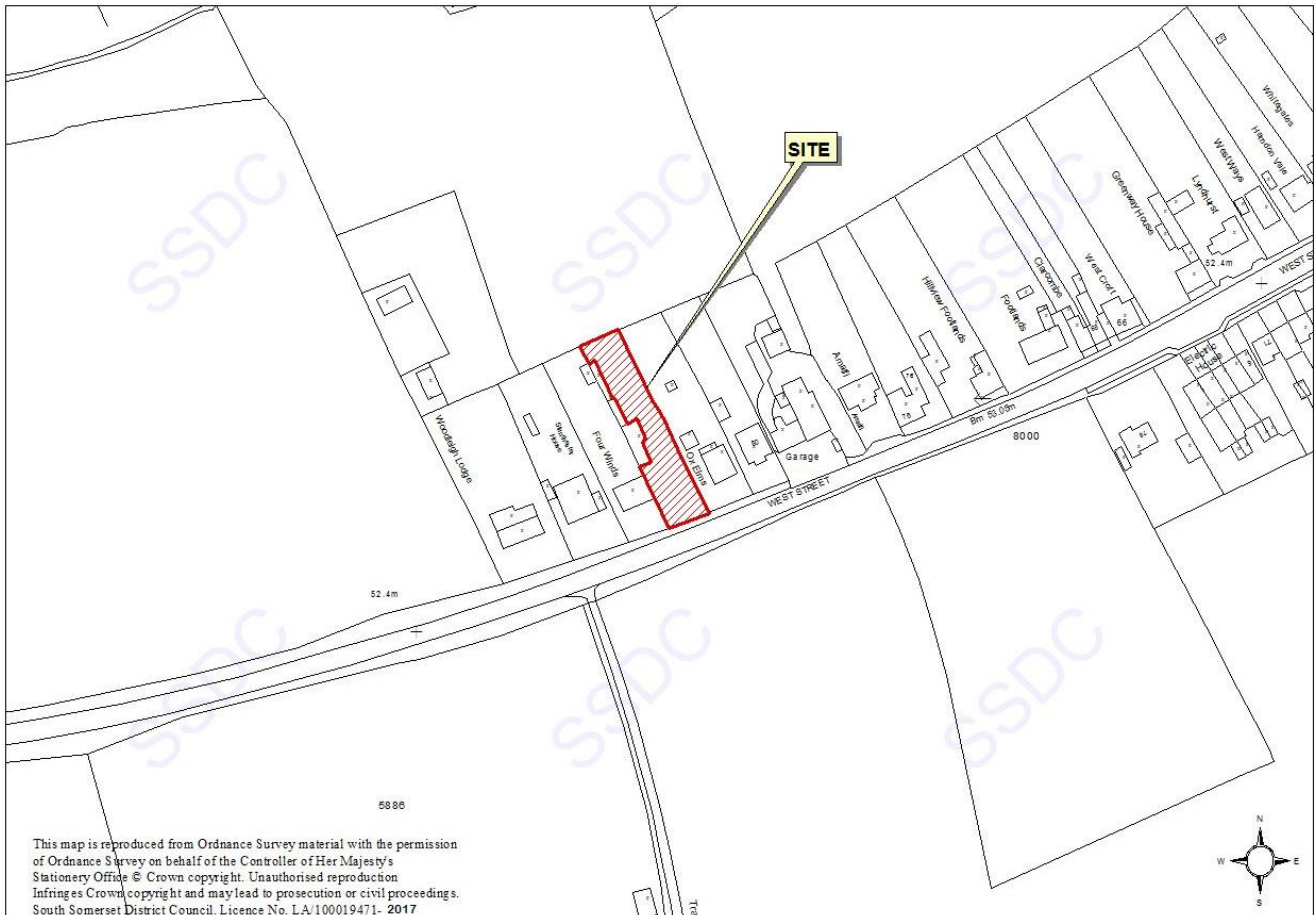
Proposal :	Certificate of lawfulness for the existing use of site as a mixed use of residential and retail with ancillary storage.
Site Address:	West End Stores, West Street, Stoke Sub Hamdon.
Parish:	Stoke Sub Hamdon
HAMDON Ward (SSDC Member)	Cllr Sylvia Seal
Recommending Case Officer:	Adrian Noon Tel: 01935 462370 Email: adrian.noon@southsomerset.gov.uk
Target date :	25th May 2017
Applicant :	Michael Legg
Agent: (no agent if blank)	Mrs D Stephens, Battens Solicitors Ltd, Mansion House, Princes Street, Yeovil BA20 1EP
Application Type :	Certificate of Lawful Use

REASON FOR REFERRAL TO COMMITTEE

This application is referred to Committee by the Development Manager at the request of the ward member, in view of the history of the site and the concerns raised locally.

THE SITE AND SURROUNDINGS





The property site is located on the north side of West Street, on the western outskirts of the village of Stoke-sub-Hamdon and within the development area. The surrounding properties to the east and west are residential, with open land to the north and south. The only other commercial property in the vicinity is a garage, three properties to the east.

The site comprises of a detached 2 bedroom bungalow with garden area to the front and rear and a driveway along the western side of the plot. There is an outbuilding to the west side of the plot at the rear of the bungalow which has a historic permission (1954) for retail use and store. There are further structures in what used to be the rear garden, however these are difficult to discern given the amount of material (window and door units) stored to the rear.

THE PROPOSAL

The submitted site plan suggests that the lawful use comprises a dwelling plus:-

1. Retail use within out building as per 1954 permission)
2. Storage/display of stock (PVC/metal/wooden doors and windows) within the entire rear and side garden areas up to 2m in height in open areas.
3. Driveway – display of 2 doors and 2 windows bearing signage.
4. Pathway from drive to front door.
5. Storage/display of garden products/ornaments in middle part of front garden
6. Storage/display of stock in eastern part of garden, not to exceed 1.2m
7. 2m fence to be erected at rear of drive.

RELEVANT HISTORY

SE4844 – Erection of a sweet and cigarette shop – refused January 1954- appeal allowed. The Appeal decision indicated that there was an existing market garden use to the rear.

22186/B – Erection of extension to existing shop store at West End Stores – permitted with conditions – October 1966

4844/C – Erection of tomato store – Permitted with conditions – September 1970

800163 – The use of existing shop stores for the assembly and distribution of timber garden sheds and the manufacture and process of rabbit hutches at West End Stores – permitted with conditions – May 1980 – temporary permission which expired 31 May 1982

820736 – The continued use of existing shop stores for the assembly and distribution of timber garden sheds and manufacture and process of rabbit hutches at West End Stores – permitted with conditions – July 1982 – temporary permission which expired 30 June 1983

831153 – The continued use of existing shop stores for the assembly and distribution of timber garden sheds and manufacture and process of rabbit hutches at West End Stores – temporary permission which expired 31 July 1986

861969 – Continued use of shop stores for the assembly and distribution of timber garden sheds and manufacture of rabbit hutches – permitted with conditions November 1986 – temporary permission which expired 30 November 1989

89/01861/FUL – The continued use of shop stores for the assembly and distribution of timber garden sheds and manufacture and process of rabbit hutches – refused – March 1990

E94380/E94379 - Appeal against enforcement notice dated 22/01/91 served following refusal of planning application 89/01861/FUL (above) – split decision (24/01/92). This allowed the continued use of land for residential and retail purposes on a temporary basis (5 years) subject to conditions, but upheld the enforcement notice in respect of the dismantling of pallets/other timber articles/sheds/hutches/other wooden articles. This use has now ceased.

97/00079/COU – Use of land and buildings for residential and retail purposes permitted with conditions February 1997 – temporary permission which expired 01 March 2002. The “retail” element restricted the goods for sale to “garden sundries”, with other restrictions relating to the location, amount and height of goods displayed and that the permission was personal to the applicant.

02/00453/COU – Use of land and buildings for residential and retail purposes (renewal of temporary permission 97/00079/COU) permitted with conditions (April 2002) – temporary permission for 5 years, which lapsed on 01 March 2007. This permission was personal to the applicant, limited to ‘garden sundries’, required the drive way to be kept clear and limited storage in the front garden to 25% of its area with nothing to be stacked more than 1m high.

13/03341/COU – application for the continued use of land for a mixed use of residential and B8 storage of used windows and doors with ancillary sales refused (03/03/14) for the following reason:-

Notwithstanding the circumstances of the case the proposed continuation of the use of the site for the B8 storage of used doors and windows, even for a temporary period, would have unacceptable visual impacts in this residential area to the detriment of the amenities of the

locality. As such the proposal is contrary to saved policies ST5 and ST6 of the South Somerset Local Plan and the policies contained within the NPPF (2012).

13/00101/BRCOND – 1st enforcement notice issued (09/10/14) against the failure to restore the land in accordance with condition 3 of 02/00453/COU which stated:-

The use hereby permitted (other than that allowed on appeal on 6 October 1954) shall be for a limited period expiring on 1 March 2007 and by the end of such period the use shall cease and any buildings, works or structures comprised in the said development shall be removed and the land restored to its former condition.

Reason: To safeguard the amenities and character of the area.

It was contended that the condition had not been complied with because the retail use of the land has continued since 1st March 2007.

9th October 2014 – Section 215 notice served to require clearance of land.

The enforcement notice was successfully appealed (APP/R3325/C/14/3000142) with the Inspector deciding that the previous 'retail' use had ceased. In his view there has been "unauthorised development consisting of a material change of use to use for mixed storage and residential purposes." (Para. 3 of decision letter).

The Inspector identified further defects with the notice in relation to shaded areas of 'under-enforcement' and access to those areas. Consequently the notice was quashed on the grounds that it was flawed beyond correction.

13/00101/BRCOND – 2nd Enforcement and S.215 notices issued (29/10/15) against the change of use of the land from residential use to a mixed use for residential use and Class B8 use as a reclamation yard involving primarily the display and storage of building materials, including used windows, doors, garden sundries, fencing and other non-domestic items with a minor level of ancillary sales. Enforcement notice withdrawn 06/07/16 following appeal. S215 notice also appealed, case pending in magistrates court, likely to be heard 14/06/17.

15/04864/COL – 12 October 2015 application submitted for a Certificate of Lawfulness for the existing mixed storage and residential purposes with ancillary retail. This application is subject to an appeal against non-determination, lodged following the withdrawal of the second enforcement notice. The Council's Statement of Case sets out that:-

4.2 It will be explained that at the time of the submission the local planning authority was seeking to take enforcement action against what was regarded as the unauthorised storage of items at the premises. The context of this will be set out with regard to the previous enforcement notices.

4.3 The local planning authority's consideration of the activities at the appeal site following the quashing of the previous enforcement notice will be set out. It will be explained that the inspector's decision was not challenged at the time as the Council accepted that whatever use persists at the site it is not in breach of a condition of a previous permission.

4.4 In this respect it will be shown that the use of the site post-2007 is a new chapter in its planning history. Accordingly it will be argued that the storage of items across the site

needs to be looked at in terms of the purpose for which they are being stored at West End Stores.

- 4.5 *With reference to the planning history and information provided by the appellant in support of previous applications it will be demonstrated that the items stored at the premises are in fact 'stock' in connection with his business selling second hand doors and windows. In addition it will be argued that the keeping of such stock on this site is not a B8 storage activity and that its sole historic purpose for being on site is to be sold as part of the appellant's A1 retail activities. It will be shown that retailing remains the primary non-residential use of the site.*
- 4.6 *On this basis it will be argued that, notwithstanding the conclusions of the previous inspector (which were made in light of the only evidence available to him under the written representations procedure) any storage use is ancillary to this retail activity and is not therefore a use in its own right. In short it will be shown that the lawful use of the site is for mixed residential and retail purposes with ancillary storage, and thus a Certificate of Lawfulness for the use of the site for B8 storage should be declined.*

Part of the applicant's case is that the 1992 Inspector noted the presence of many doors and windows at the site at the time. Their argument is that a mixed residential/storage (C3/B8) started at this time and, despite the subsequent run of temporary permissions for residential/retail use the applicant was in fact operating the residential/storage use and continues to do so to this day. They point to the comments of the most recent enforcement appeal (APP/R3325/C/14/3000142) inspector's comments to the effect that a material change of use to use for mixed storage and residential purposes has occurred.

17/01632/COL – In light of the Council's statement of case (3.18 above) the applicant has submitted the current application inviting the Council to formally accept that the lawful use of the site is "mixed residential and retail with ancillary storage". Should this application be approved the appeal against the non-determination of 15/04864/COL would probably be withdrawn.

CONSULTATIONS

Stoke-sub-Hamdon PC –

The Parish Council continues to believe that the use of the site is unlawful; that the site's main use is not the ancillary retail and associated mixed storage applied for retrospectively, but is actually the hoarding of windows and doors. Councillors wish to observe that the piling up and hoarding windows and door materials to an unacceptable height and quantity in the front garden, round the sides and at the back continues to be an eyesore and a serious public health issue for the village. The stacking up of such materials is such that Mr Legg, who is an elderly man and who lives on his own, could quite easily have an accident by falling and being squashed under the weight of the doors, which are dangerously stacked. As a consequence of the use of the site, there is a continual rat problem causing public health and safety issues, and a very real fire risk, not only to the property and materials themselves, but also potentially to neighbouring properties and to commercial petrol pumps at a nearby garage. There is visible long term damage to neighbouring fences which is ongoing

SSDC Legal Services – notes that:-

"The nature of goods sold over the years has changed – market garden, cigarettes & sweets, sheds and rabbit hutches, garden sundries and now building materials, predominantly doors and windows,

but a mixed residential and retail use has remained a continuous thread throughout, and the accounts provided from 2004 evidence a fairly consistent level of retail activity.....

“The Council does not therefore have any evidence of its own to suggest that use of the various areas of the site as proposed in the application are not lawful.....

“Therefore..... a certificate should be issued in relation to the mixed residential and retail use, plus ancillary storage in relation to the retail use.”

REPRESENTATIONS

3 letters received raising concerns about the impact of the activities which are not material to this application for a certificate of lawfulness. One does not consider the level of storage to be ancillary to the low level of retail activity.

CONSIDERATIONS

The applicant has provided a statutory declaration in which he acknowledges that the Council considers the used to be mixed residential and retail with a large amount of ancillary storage. He considers that this use has existed, unchanged, throughout the last 20 years and more.

A review of the Council's enforcement files shows that following the 1992 split appeal decision the LPA actively considered prosecution in relation to the ongoing storage of timber items and the manufacture of hutches. Photographs from 1993/4 show there to be a lot of timber doors and windows stored at the site. These were being dismantled to provide the timber for the hutches as such there storage was where ancillary to the unauthorised manufacture of hutches that was subject to an upheld enforcement notice that presumably remains in force. The levels of storage are in no way comparable to the levels seen today.

By letter (06/09/93) the LPA accepted that any remaining items were for “purposes incidental and ancillary to the domestic and personal enjoyment of the occupiers of the dwelling”. Subsequently enforcement investigations focused on whether or not the manufacturing recommencement (it didn't) and possible breaches of the temporary retail permission granted by the Inspector. Following the various renewals these complaints fell away.

I consider therefore that the applicant could not rely on the observations of the 1992 Inspector as identifying the commencement of a storage use. I consider that he was viewing the site in the context of closing the previous ‘manufacturing’ chapter of the property's planning history (when the observed door and windows were on site simply as material for the outgoing use) and the opening of a new retail/residential chapter. This new use was then operated for some 15 years as per the scheme allowed at appeal and two subsequent renewals (97/00079/COU and 02/00453/COU) after which the retail element of the site should have reverted to its 1954 status.

I considered the 1954 permission allows an open retail use to operate from the outbuilding; it does not restrict the retail activities or range of goods to be sold in any way. The permission is silent on the matter of outside storage, although the site plan appears to identify just the building and a small area to the east side and rear as the “proposed site”. Subsequent permissions (1966 & 1970) extended this and I would consider it reasonable to now view these as stores for the retail use.

The ‘market garden’ use mentioned by the 1954 Inspector has long since ceased operation and I believe that the intent of the 1992 temporary permission, and subsequent permissions, was simply to

allow an expansion of the approved retail use subject to the restrictive conditions, after which the retail use should have reverted to the scope of the 1954 permission and the remainder of the site to residential (i.e. a house and garden).

Whilst this intent is understandable I have reservations about the validity and robustness of this approach for a number of reasons. Firstly none of the temporary retail/residential permissions are clear about what exactly the site is to revert to. The original 1992 appeal decision refers simply to “the use hereby permitted (other than that allowed on appeal on 6 October 1954)” ceasing 5 years after the decision (i.e. by 24/01/97). The requirement to revert to the 1954 permission ignores 1966 and 1970 permissions for extensions to the shop building. It also arguably has the effect of requiring the applicant to recommence the abandonment market garden use recorded by the 1954 Inspector.

The 1997 and 2002 renewals repeat this requirement although they both add a requirement that “any buildings, works or structures comprised in the said development shall be removed and the land restored to its former condition”. However no buildings were permitted by these permissions and it is unclear what was meant by the reference to ‘former condition’. On this basis I am of the opinion that drafting and requirements of the temporary time period conditions that have been imposed are so vague as to render them difficult to enforce.

Secondly if we were to take the temporary conditions at face value, what is the ‘1954 position’? Clearly this gives us a shop (and small storage area) and a house (with drive and front garden area). The problem is what was the use of the rear garden at that time? The 1954 Inspector states that the appellant (the current owner’s parents) “*bought the property in 1939 and had developed the garden space at the rear as a market garden and had retailed the produce from the premises. The market garden would not support him and his wife, but they thought that with the addition of a small general store as proposed, they would get a reasonable living.*”

The Land Use Gazetteer suggests that a market garden is a sui generis use. It is my experience that many such enterprises, though diversification, end up selling a wide variety of goods and eventually acquire the characteristics of a garden centre. i.e. an A1 retail use. It is unclear how the use of the site evolved immediately after the 1954 appeal decision, however it seems that a number of sheds were added and used in connection with the shop:-

- Hand written note on a letter dated 25/03/76 to Mr EG Legg from building control refers to numerous shed used in connection with the shop which appear to require planning permission
- File note 14/04/76 notes that timber sheds to rear of tomato store have been removed and a stone building erected;
- File noted dated 13/05/76 confirms stone building to rear of tomato store to be permitted development;
- File noted dated 03/06/76 confirms a greenhouse removed from the front garden had been erected to rear of tomato store;
- A complaint letter from Fourwinds dated 26/06/78 refers to “*yet another extension to the conglomeration of buildings*” appearing and states that “*when I purchased my property some 5 years ago it was adjacent to a small and contained village grocery shop*”.

A memo dated 23/08/78 from the Chief Planning Officer notes that the premises have been investigated on a number of occasions and observes:-

“the situation is that within the grounds of the bungalow owned by Mr Legg, there is a shop which has the benefit of planning permission. Also in 1970 planning permission was granted for the erection of a “tomato store” some 32 feet in length to the rear of said shop. From correspondence on the file it is clear that the tomato store was, to all intents and purposes, an extension to the shop.

“There is no planning control over the opening hours of the shop.....”

“.....Under the circumstances I do not consider that there are any breaches of the planning regulations relating to West End Stores and I do not propose to take any further action.”

It seems that by the time of the submission of the 1980 application the retail focus had changed from sweets and cigarettes to larger items i.e. garden sheds and rabbit hutches for which permission was sought, and given, to construct on site. This permission allowed for the fabrication of items that the applicant then sold via the existing retail.

From correspondence the 1980s planning files it is clear that sales further diversified into garden sundries. Evidence of the retail element is clear from ongoing problems over advertising signs and indicates that the non- residential component of the use of the site was for retail purposes with manufacturing, as allowed within the shop stores by the temporary permissions granted in 1980, '83 and '86. Any storage use outside the stores to the rear of bungalow, was simply ancillary to either the manufacturing or the retail use. A letter dated 31 July 1986 (on the file relating to the 1983 permission) from the case officer to the neighbour states:-

“the use of the front garden of the premises as a storage and display area in conjunction with the established use of part of the premises as a shop does not require planning permission.”

It is considered that at the time it would have been reasonable to draw a similar conclusion in relation to land to the rear.

By at the end of the 1980s it appears that any external storage use the site was ancillary the (lawful) retail (or residential) use of the site. Certainly this was the view expressed in the officer's report in relation to the refused 1989 application:-

“Site inspection shows that the entire garden, front and back, is used for commercial purposes- mainly for the storage of goods to be sold. The front garden is covered with the kind of do-it-yourself materials which a keen gardener would use, while the back gardens contains, in addition to the shop, about 9 buildings. One is used to garage the households two vehicles, four are used for storage in connection with the shed/rabbit hutch manufacturing. All open spaces are filled rabbit hutches, etc. ready for sale. A common theme throughout is the reclamation of materials, mainly timber, particularly from old pallets. Mr Legg works on his own, bringing into the site old doors, windows, and similar demolition or scrap material. The best quality items are simply stored for re-sale as they are, while the broken or low value items are broken down into individual timbers, which are stored, and then used to make pet cages and garden sheds.”

A representation relation to the 1989 application reinforces this view:-

“these premises were originally a village grocery/general store and over the years appear to have become basically a garden centre....”

The 1992 enforcement appeal opens a new chapter in that the manufacturing use ceased and the Inspector considered the scope of the 1954 retail permission. At that stage the LPA considered that only the shop and tomato store to the rear benefited from a lawful retail use. However whilst the inspector agreed with the Council on the harmful impact of allowing the manufacturing use to continue he accepted that the expanded retail sales area to the rear of the bungalow (i.e. beyond the 1954 permission) was, in principle, acceptable (para. 8). He went on to conclude (para. 10) that:-

“I have accepted that the use of the curtilage by your clients in connection with retailing can be acceptable.... I therefore propose to grant permission for the continued use of the land and

buildings for residential purposes and for the storage and display in connection with the permitted shop premises.”

Whilst is at odds with the advice offered in the letter of 31 July 1986, the letter remains evidence of the retail use that was occurring at that time.

At the end of the temporary period allowed by the inspector the situation should have reverted to the 1954 position however that ignores the situation that subsequently became established between 1954 and 1992. In effect the Inspector's requirement seeks to revoke the 1966 and 1970 permissions and remove the wider retail use that had developed.

It is accepted that the 1992 Inspector (and the 2015 Inspector) did not have the benefit of a full examination of the development of the use of the site; nor could he foresee the site's subsequent uses.

The evidence available does not in my opinion allow a clear decision to be made. The neighbour's photograph from 1989/90 simply shows garden sundries being displayed in the front garden area. The 2015 photographs taken by the Daily Telegraph show items, albeit different items, being similarly displayed in the front garden area, with other items placed one land to the rear. Nothing can be inferred about the why these items are on the land or the site's 'planning use' from these later photographs.

It is more useful to consider the intent behind the item's presence on the land. The appellant's supporting case for the current CLEUD makes it clear that for a considerable time he has acquired items, particularly door and window units. It is not considered that is conclusively indicative of a 'storage use' and there is no flaw in the 1992 Inspector's reasoning that "virtually all available space in pressed into use for displaying goods for sale".

The applicant continues sell items. Whilst this is not a particularly profitable business when judged against normal expectations, it is nevertheless a retail operation that happens to carry a large level of low value stock. This stock is not stored here to be sold elsewhere; it is not being dismantled for recycling or being stockpiled for mass disposal (such matters would require action by the relevant waste and minerals authority). These items, predominantly used doors and window are here because this is where the appellant operates his retail enterprise.

It is noted that the accounts show that the business has been operating at roughly the same level of profit since 2004 and that the use of the rear part of the site, which was not restricted by the run of temporary permissions from 1992-2007, has continued uninterrupted for some 25 years. Whilst the temporary permissions sought to control activities within the front garden, it appears that the restrictions were breached from an early date in terms of the material stored and the manner in which it was stored.

On this basis it is considered that, on the balance of probabilities, there has been no material change of use of the site in the requisite period (i.e. 10 years). Indeed it is apparent that the current use of the site stretches back to the 1990. Furthermore it is considered difficult to dispute that the current use is incompatible the 1954 position (as amended by the 1966 and 1970 permissions) to which the site could and should have reverted.

It is advised that the Council would be unlikely to succeed in defending a refusal of this application and it is suggested that the best option for the Council would be to grant the COL for retail with ancillary storage, as suggested.

Notwithstanding the local concerns it is considered that there are no reasonable grounds to disagree

with this advice. Furthermore the Council's proof of evidence submitted in relation to the appeal against the non-determination of the Certificate of Lawfulness for the mixed residential /B8 use (15/04864//COL) argues that the appeal should be dismissed because the lawful use is residential/retail with ancillary storage as proposed by this application.

RECOMMENDATION

That a Certificate of Lawfulness be issued in a form approved by the Council's solicitor.
