LEGAL OPINION

Sheeplands Farm, Goffs Barn, Wargrave Road, Wargrave RG10 8DJ

1. Introduction

1.1 Thrings LLP are instructed by Hall-Hunter Partnership ("the Applicant") to provide a legal opinion in support of the Certificate of Lawful Existing Use Application ("the CLEUD Application") at Sheeplands Farm, Goffs Barn, Wargrave Road, Wargrave RG10 8DJ ("the Site").

1.2 The Applicant submitted a Certificate of Lawful Existing Use Application for "*the use of land for the stationing of 64no. mobile homes for use as habitable accommodation by farm staff, staff shop, staff launderette portacabin and staff parking, and operational development including staff amenity building, staff gazebo building and associated pathways, hardstanding and drainage*" to Wokingham Borough Council ("the Council").

1.3 The Council issued a split decision, allowing permission for the hardstanding constructed to the south of the Site and the footpaths in the northern part of the Site ("the Partial Permission"). However, permission was refused for the stationing of 64no. mobile homes for use as habitable accommodation by farm staff, staff shop, staff launderette portacabin and staff parking along with operational development including staff amenity building, staff gazebo building and associated pathways and drainage ("the Refused Partial CLEUD").

1.4 The CLEUD Application seeks to regularise the remaining parts of the Refused Partial CLEUD, which includes:

i. The stationing and use of 64.no mobile homes for both seasonal and year round accommodation for staff;
ii. Staff shop;
iii. Staff launderette portacabin;
iv. Staff parking;
v. Staff amenity building
vi. Staff gazebo building with associated pathways: and
vii. Drainage

2. Planning History

2.1 The planning history for the Site is as follows:

Application Reference	Description	Decision
CLE/2010/1310	Application for a certificate of lawfulness for existing building works relating to 21 mobile homes comprising construction of earth bunds, erection of fencing, laying of underground drains and services and construction of hardstanding	Refused 18/08/2010
150522	Proposed change of use of land for the siting of four mobile homes for occupation by agricultural workers	Refused – 07/12/2015 Dismissed at Appeal – 27/06/2016

2.2 It is clear from the planning history of the Site that the Applicant has sought to regularise the use of the mobile homes and the associated development since at least 2010.

3. Statutory Framework & Guidance

Planning permission and conditions

3.1. Section 57 of the Town and Country Planning Act 1990 ("the Act") provides that planning permission is required for the carrying out of any development of land. Development is defined under section 55 to mean: "*the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land*".

3.2. Under section 70 of the Act, local planning authorities are permitted to grant planning permission either unconditionally or subject to such conditions as they consider appropriate. In particular, section 72 provides that conditions may be imposed "*for regulating the development or use of any land under the control of the applicant (whether or not it is land in respect of which the application was made) or requiring the carrying out of works on any such land, so far as appears to the local planning authority to be expedient for the purposes of or in connection with the development authorised by the permission*".

National Planning Policy Framework ("NPPF") on conditions

3.3. Further guidance regarding the application of conditions is available under paragraphs 55 and 56 of the NPPF as follows:

> *"55. Local planning authorities should consider whether otherwise unacceptable*

development could be made acceptable through the use of conditions or planning obligations. Planning obligations should only be used where it is not possible to address unacceptable impacts through a planning condition.

56. Planning conditions should be kept to a minimum and only imposed where they are necessary, relevant to planning and to the development to be permitted, enforceable, precise and reasonable in all other respects. Agreeing conditions early is beneficial to all parties involved in the process and can speed up decision making. Conditions that are required to be discharged before development commences should be avoided, unless there is a clear justification."

Certificate of Lawfulness of Existing Use or Development

3.4. Section 171B of the Act provides for the time limits after which a local planning authority cannot take enforcement action pursuant to section 172 of the Act in respect of a breach of planning control. What amounts to a breach of planning control is defined in section 171A of the Act as being either: (1) the carrying out of development without the required planning permission; or (2) failing to comply with any condition or limitation subject to which planning permission has been granted.

3.5. Section 115 of the Levelling-up and Regeneration Act 2023 amended section 171B of the Act to extend the time period in which local planning authorities can take enforcement action against unauthorised developments in England from four years to ten years. Section 115 came into force on 25 April 2024 and the subsequent legislation provided the transitional periods for the amendments made by section 115 to section 171B of the Act.

3.6. The amended s171B states as follows:

"171B - Time limits.

(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—

(a) in the case of a breach of planning control in England, ten years beginning with the date on which the operations were substantially completed"

3.7. In accordance with the transitional periods, no enforcement action can be taken by the local planning authority where the operations were substantially completed before 25 April 2024 (following the introduction of section 115 of the Levelling-up and Regeneration Act 2023), after the end of the period of four years beginning with the date on which the operations were substantially complete.

Where operations were substantially completed on or after 25 April 2024, the period is ten years.

3.8. For reference, section 171B of the Act provided as follows: "*171B.— Time limits*.

> *(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.*
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> *(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.*
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> *(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."*

3.9. As explained by the Court of Appeal in *Arun District Council v First Secretary of State* [2007] 1 WLR 523, at [22], if either of these matters are satisfied, there is a breach of planning control for the purposes of section 171B of the Act, which carries forward the phrase "breach of planning control" into its provisions. However, it is necessary to have regard to the specific nature of the breach of planning control in issue, since varying time limits apply depending on what the breach is that has occurred.

3.10. It follows that where the breach of planning control consists in the change of use then the ten year rule applies. All breaches of planning control are subject to time limits where the local planning authority can take enforcement action. For operational development, it is four years from the date on which the operations were substantially completed. In order to correctly assess the relevant enforcement periods, the original s171B is applicable to the Site.

3.11. Section 191 of the Act states as follows:

"(1) any person wishes to ascertain whether—

> *(a) any existing use of buildings or other land is lawful;*
> *(b) any operations which have been carried out in, on, over or under land are lawful; or*
> *(c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.*

(2) For the purposes of this Act uses and operations are lawful at any time if—

(a) no enforcement action may then be taken in respect of them (whether because they did

not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
(b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force. ..."

3.12. If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

3.13. It is clear, therefore, that there is no discretion for the LPA. It is a pure question of fact. If, in the case of applications for existing use, 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.

3.14. Moreover, it is settled law that once the immunity period is complete, what was formerly a breach of planning control becomes "*lawful at any time*" and cannot thus be enforced against. To this end, in *R (Ocado) v Islington LBC [2021]* EWHC 1509 (Admin), the Court highlighted how the Planning and Compensation Act 1991 gave effect to the recommendations of the Carnwath Report by inserting section 171B into TCPA 1990 and by substituting new sections 191-196. The Court also highlighted two important points:

3.15. First, the introduction of the "rolling" nature of the ten years' time limit simply meant that the landowner would not have to do any more than show that a breach of planning control has existed for a minimum period of ten years prior to the date on which the issue of immunity falls to be determined. Further, the Court emphasised that:

"*it did not mean, as has sometimes been said, that the only way of demonstrating immunity was by looking solely at the 10-year period immediately prior to the date of an application for CLEUD or the issuing of an enforcement notice. The 10-year rule might have been satisfied at some point prior to that date*"; and

"*Second, once the 10-year rule is satisfied, the breach of planning control becomes lawful. In other words, a legal right in respect of what had previously amounted to a breach of planning control would accrue. The 10-year time limit for taking enforcement action might have expired at some point in the past, but the Carnwath Report did not suggest that any right which accrued in this manner would be lost merely because it did not continue to be*

exercised or exercised actively".

3.16. In summary, *Ocado* makes clear that once an immunity period is satisfied, the legislation prohibits the taking of enforcement action thereafter; and once the immunity period is complete, what was formerly a breach of planning control becomes "*lawful at any time*" (save only that that planning right does not accrue if it would contravene the requirements of an enforcement notice then in force, although there is no extant enforcement notice in this circumstance).

3.17. *Ocado* draws on the earlier case of *Panton and Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461, in which it was established that a lawful use which was merely dormant or inactive could still be 'existing' so long as it had already become lawful and had not been extinguished by abandonment, the formation of a new planning unit or by a further material change of use.

3.18. Planning Practice Guidance offers the following commentary on lawful development certificates:

> ***How is a lawful development certificate obtained and what does it mean?***
> *Anyone can apply to the local planning authority to obtain a decision on whether an existing use or development, or a proposed use or development, is lawful for planning purposes or not. If the local planning authority is satisfied that the appropriate legal tests have been met, it will grant a lawful development certificate. Paragraph: 002 Reference ID: 17c-002-20140306 Revision date: 06 03 2014*
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> ***Who is responsible for providing sufficient information to support an application?***
> *The applicant is responsible for providing sufficient information to support an application… In the case of applications for proposed development, an applicant needs to describe the proposal with sufficient clarity and precision to enable a local planning authority to understand exactly what is involved. Paragraph: 006 Reference ID: 17c-006-20140306 Revision date: 06 03 2014*
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> ***How is an application for a lawful development certificate determined?***
> *A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process. In determining an application for a prospective development under section 192 a local planning authority needs to ask "if this proposed change of use had occurred, or if this proposed operation had commenced, on the application date, would it have been lawful for planning purposes?" Paragraph: 009 Reference ID: 17c-009-20140306 Revision date: 06 03 2014 6.4*

3.19. This guidance clearly sets out the test for the local planning authority must apply and the limits on the information that they are required to consider. Importantly it confirms that planning merits are

irrelevant for the purposes of their determination. The Council will be aware that *Gabbitas v Secretary of State for the Environment* [1985] JPL 630 provides that the relevant test of the evidence in assessing an application for a certificate of lawfulness is on the balance of probability. The Gabbitas case also concludes that an Applicant's evidence does not need to be corroborated by independent evidence in order to be accepted.

3.20. *Basingstoke and Deane v SoSCLG* [2009] EWHC 1012 (Admin) considered the removal of an agricultural occupancy condition - governed by the ten year rule - but where there was a gap in the immunity period occasioned by refurbishment works. The outcome here was that as there was a clear intention to further the breach during the period of refurbishment works there was no break in the chain and immunity was acquired regardless of the gap in the immunity period. In the judgment of Mr Justice Collins, at paragraph 41, states:

> "*What has to be done is to look to see what have been the relevant activities over the 10-year period in relation to the building in question. To put it in the context of this case, has there been what could properly be regarded as a breach of the condition over the whole of that period, whether or not there was anyone in physical occupation during any particular part of that period? The answer to that, as it seems to me, is that where there has been a clear breach, in the sense of the use for other than an agricultural tenant, as was the case from 1993 onwards, a gap during which refurbishment took place, in order to make the dwelling more attractive for continuing breach, is a period during which the breach continued. It continued because the activities then being carried out in relation to it, whether marketing, whether sorting out the correct persons, or company, to do the work, whether doing the actual work itself, were all in furtherance of the breach of condition. Thus, as it seems to me, if enforcement action had been taken during the period when the negotiations were being carried out for the refurbishment to be done, or while the refurbishment was being carried out, or while the property was being marketed, it would have succeeded because all would have been properly regarded as breaches of the condition, because that was the purpose behind the activities being carried out*."

4. Analysis

4.1. As part of the Refused Partial CLEUD, the Council considered the principle under *Murfitt v Secretary of State for the Environment and East Cambridgeshire District Council* (1980) 40 P&CR 254. The High Court considered that where operational development is part and parcel of the material change of use or integral to it, then the four year rule would not apply and therefore, the works would be subject to the ten year enforcement time limit.

4.2. In the Officers Report for the Refused Partial CLEUD, the Case Officer considered that "*the change of use brought about the operational development, rather than the operational development*

bringing about the change of use. This means that the operational development must have been substantially completed 10 years prior to the date of the application's submissions rather than four".

4.3. The Murfitt principle is applied when seeking immunity for parts of development considered in isolation. It means that immunity cannot be claimed where the development was carried out in order to facilitate the unlawful change of use, which in itself has not acquired immunity (as it would fall under the ten year rule). The Murfitt principle has to be viewed in the context and circumstances of each individual case. In *Somak Travel Ltd v Secretary of State for the Environment* [1988], the test in Murfitt was essentially whether the operational activity was integral to or part and parcel of the change of use. If the operational activity was integral to the change of use, it should not be considered separately to the change of use.

4.4. In the Refused Partial CLEUD, the operational development consisted of staff parking, staff amenity building, staff gazebo building, southern pathways and drainage. Given the history of the Site, it is clear that the change of use is over ten years old and that the staff shop and staff launderette portacabin is part and parcel of the change of use. Any operational development has not been integral to, or part and parcel of, an unauthorised change of use. Therefore, the operational development on the Site is still immune after four years and the Case Officer misapplied the Murfitt principle when determining the Refused Partial CLEUD.

4.5. Further, the Case Officer incorrectly assessed the stationing of the mobile homes along with the use of the mobile homes as habitable accommodation. The Case Officer states "*It is not disputed that the 64. Mobile homes within the application have been on site in excess of 10 years*". The Case Officer ultimately took the view that that the occupation of the mobile homes has not been consistent across the same period.

4.6. It would appear that the Case Officer has conflated the use of the land for the stationing of the mobile homes with the physical occupation of the mobile homes. It is clear that the stationing of the mobile homes has occurred on the Site for an excess of ten years and this is plain to see in the aerial photographs produced by the Applicant. Within the officers reports for application CLE/2010/1310, we see the case officer confirm that the mobile homes had been stationed since at least 2003.

4.7. The occupation of the mobile homes for agricultural workers is immaterial to the use of the land for the stationing of the mobile homes as the use had accrued immunity prior to the submission of the Refused Partial CLEUD. As per *Ocado*, once immunity is gained, the lawful use right can only be lost through abandonment or a supervening event such as a material change of use or the creation of a new planning unit.

4.8. The position here as set out by the Applicant is that there has been a continuous breach of planning control in relation to the change of use of the land. This change of use is from Agriculture to the siting of mobile homes for use by agricultural workers on a seasonal or year round basis. Whilst the

use of the individual mobile homes has not been continuous for ten years, the use of the land for the siting of those mobile homes has been. In so far as it is relevant, when it comes to the use of the mobile homes itself, it has always been the intention to occupy them in each fruit picking season as required. As such, it is submitted that any occasions when the mobile homes were empty were de minimus periods.

4.9. In accordance with *Basingstoke and Deane*, the de minimus periods where the mobile homes were not in occupation is due to the nature of the agricultural workers and their need for accommodation over certain periods in the year. Furthermore, the Council have been aware of the use and occupation of the mobile homes since at least the application bearing the reference CLE/2010/1310 but chose not to enforce against it. At all times the Council could have taken enforcement action against the siting of the mobile homes themselves, even when there were no seasonal workers in occupation. The use of the majority of the Site for the stationing of mobile homes for both year round and seasonal accommodation has been continuous since 2003. This use expanded southwards to increase the area used for the mobile homes as seen in the aerial photograph of 2013, but has remained consistent both in terms of site area and number of mobile homes since that point. As a result, the ten year immunity period applies, and evidence has been submitted demonstrating that this immunity has accrued.

4.10. The ten year time limit begins to run from the date of the breach. It is established law that the date of the breach is the date on which the relevant use began. In *Thurrock BC v SOSE* [2001] EWCA Civ 226 the Courts confirmed that the period of a breach includes times when the activity is not currently going on provided it has not ceased. This means that evidence of a continuing annual cycle of events for over ten years will be enough to establish the ongoing breach and that enforcement action cannot be taken after ten years following the first occurrence of this date.

4.11. The evidence provided with this CLEUD Application confirms that the use of the land for the stationing of mobile for workers accommodation has been occurring on the Site since 2003 and this use expanded southwards to increase the area used for the mobile homes by 2013 and has remained at this level since. Therefore, it is submitted that the use of the land for the stationing of the mobile homes has been occurring on the Site since 2003 and by virtue of time, the use of the Site has now accrued immunity as under s171B of the Act.

4.12. The transitional periods allowed by section 115 of Levelling-up and Regeneration Act 2023 means that no enforcement action can be taken by the local planning authority where the operations were substantially completed before 25 April 2024, after the end of the period of four years beginning with the date on which the operations were substantially complete. Therefore, the operational development on the Site (which consist of the staff parking, staff amenity building, staff gazebo building with associated pathways and drainage) cannot be enforced against by the Council as the developments have been substantially complete for a period in excess of four years and prior to 25 April 2024.

4.13. It is clear, therefore, that there is no discretion for the Council. It is a pure question of fact. The only questions in front of the Council is whether use of the land for the stationing of mobile homes for accommodation for staff and the operational development is a breach of planning control and if the appropriate immunity has been accrued. If, on the facts assessed on the balance of probabilities, that is the case, then the Council must issue a CLEUD.

4.14. Based on the above legislation and evidence included with this CLEUD Application, it is on the balance of probabilities that that breach has persisted for more than ten years for the use of the land for the stationing of mobile homes for staff accommodation as it has been continuous on part of the Site since 2003 and in the current fashion since 2013. The staff shop and staff launderette portacabin are part and parcel of the change of use. As a result, the use of the land for the stationing of mobile homes for workers accommodation is a breach of planning control which is immune from enforcement. As for the operational development, these were substantially complete prior to 25 April 2024 and for a period in excess of four years, therefore it is a breach of planning control that is now immune from enforcement.

5. Summary & Conclusion

5.1 Having regard to the evidence and case law analysed above, the Applicant has discharged the onus of proof and met the relevant tests on the balance of probability as required by the Act. We therefore respectfully request that this CLEUD Application is granted.

Thrings LLP

14 February 2025