

**For: PLANNING AND REGULATION COMMITTEE –15 APRIL 2013**

**By: DEPUTY DIRECTOR FOR ENVIRONMENT & ECONOMY (STRATEGY & INFRASTRUCTURE PLANNING)**

**Development Proposed:**

Application for a certificate of lawfulness of existing use or development, (CLEUD) for the use of land and structures for the following purposes: landscape contractor's yard including ground-works contractor's yard, with ancillary plant and vehicle storage, maintenance and repair; incidental hire of plant vehicles and equipment; storage and incidental distribution of landscaping materials and products; and for the importation, processing, storage and re-use/recycling of wastes (mainly construction and demolition wastes and green waste) for a period of over 10 years. These wastes include hardcore, rubble, subsoils and soils, timber, green garden and contracting waste, and incidental metals and plastics and other materials. Use of land includes screening waste to separate stone and concrete from soils, screening the resultant soils and fines, crushing

**Division Affected:** Burford and Carterton North East

**Contact Officer:** Taufiq Islam      **Tel:** 01865815884

**Location:** Shipton Hill, Fulbrook

**Application No:** MW.0072/12

**Applicant:** Hickman Bros Landscapes Ltd.

**District Council Area:** West Oxfordshire

**Date application:  
Received** 9 April 2012

**Consultation Period:** 3 May – 24 May 2012

**Recommendation**

The report recommends that the certificate be approved subject to limitations.

## **Introduction**

1. This application seeks to gain a Certificate of Lawfulness of Existing Use or Development (CLEUD) under Section 191 of the Town & Country Planning Act 1990 as amended by Section 10 of the Planning & Compensation Act 1991.
2. The applicant claims that the land (southern area and central intermediate area) has been in use for over 10 years for claimed uses. Sworn affidavits, aerial photographs, other photographs, invoices for plant hire and purchase, waste processing and a waste carrier's licence have been submitted by the applicant in support of this claim.
3. CLEUD applications are different to planning applications as they must be determined solely on the evidence submitted to show that a use or development has on the balance of probabilities been in operation for a period of 10 years. The planning merits of the use or development cannot be taken into account. Unlike a planning application, whether the development accords with planning policy is not relevant in the case of a CLEUD.
4. The determination of a CLEUD application is normally delegated to the Director for Environment & Economy jointly with the Solicitor to the Council. However, in this case, the local County Councillor has asked that the application be decided by the Planning & Regulation committee.

## **The Site (See Plan 1)**

5. Hickman Brothers Landscapes Ltd. (HBL) site is located on the A361 Burford to Chipping Norton road. It lies 2 km (1.3 miles) north of Burford and 0.5 km (0.3 miles) north of the village of Fulbrook. It covers 2.7 hectares in all. The application covers the 'Central Intermediate area' and 'Southern Area' only. A previous CLEUD reference 07/1774/P-CLE relates to parts of the site immediately to the north.

## **The Claimed Uses**

6. The application refers to two uses described as follows:
  - (a) use of land and structures for landscape contractor's yard including ground works contractor's yard with ancillary plant and vehicle storage, maintenance and repair; incidental hire of plant vehicles and equipment; storage and incidental distribution of landscaping materials and products; and

- (b) the importation, sorting, processing, storage and reuse/recycling of wastes (mainly construction and demolition wastes and green waste) and other landscaping materials

### **The Submitted Evidence**

- 7. The applicant claims that the land forming the application site has been in its current use for over 10 years. Four sworn affidavits, two signed statements, 4 aerial photographs, other photographs, invoices for plant hire and purchase, waste processing and a waste carrier's licence were submitted to support this claim. The affidavits are summarised in this report.
- 8. The application has stated that wastes including construction & demolition waste, green waste, spent mushroom compost, soils, subsoil and aggregates, chipped bark, fencing, timber, incidental metal and plastic items have been imported and processed at the site.

### **The Approach to Consideration of the Application**

- 9. As noted above, the decision on the application rests on the examination of evidence and not matters of planning judgement, planning merit or planning policy.
- 10. The key points to note are as follows:
  - The application seeks a certificate that an existing use is lawful.
  - A use is lawful if either:
    - (a) it has planning permission; or
    - (b) cannot be enforced against.
  - If the use is already lawful, its planning merits are not relevant.
  - Whether a certificate should be granted is a matter of fact and law, not planning merit.
  - The evidence to be considered will relate to:
    - (a) the existence of planning permission; or
    - (b) a continuity of use over a statutorily prescribed period such that enforcement action can no longer be taken.

- This application contains element of use of a land for the statutory period of 10 years preceding the date of the application.
- Guidance in Circular 10/97 advises that:
  - I. it is for the applicant to prove that the claimed use is lawful;
  - II. however, this has to be proved only on the basis of the balance of probability, i.e. that the evidence available makes it more likely than not that the use is lawful. It does not have to be proven beyond reasonable doubt;
  - III. the applicant may be best placed to produce information about present and previous activities on the land, especially about the history of the unauthorised activity;
  - IV. if the council or others have no evidence to make the applicant's version of events less than probable, there is no good reason to refuse the application provided the applicant's evidence is sufficiently precise and unambiguous;
  - V. a certificate should state the limits of the lawful use at any particular date. Examples of limits might be traffic movements, types of vehicles, sources of materials etc. These limits provide a benchmark against which subsequent changes can be assessed to see whether a material change of use has taken place from the lawful use;
  - VI. a certificate may be granted for a lesser amount of land or for some but not all of the uses applied for if the evidence does not support a certificate for all of the land or uses.

## **Background Information and Planning History**

11. The adjacent site currently has permission for a landscape contractor's yard and wood chipping business. This was granted by West Oxfordshire District Council (WODC) for the Central Area in 1985 (W.1403/85.U). In 1998 a retrospective permission was issued to cover the North-West area (W97/1866.) The Nursery area provides a connection between these two areas. Further applications on parts of the site were permitted for the erection of a workshop and store (1529/90) and an office (1530/90) by WODC, replaced by a stone office and parking (W2001/1299).
12. A retrospective application was made in 2005 to OCC for planning permission to authorise waste related activities on the HBL site and also to construct a waste transfer building and replacement workshop. The application was refused on the grounds that it would have a negative impact on the AONB and there was no overriding need for the development to be situated in the open countryside. A subsequent appeal was made but later withdrawn before it was determined.

13. A Certificate of Lawfulness of Existing Development reference 07/1774/P-CLE was granted in 2008 by the County Council for the use of the north-west, central and nursery access area (shown in the attached plan B1).
14. This CLEUD application relates to an area of land adjacent to the area covered in the 2008 CLEUD referred to as central intermediate and southern area of the HBL site (shown in the attached plan A).
15. For the avoidance of any doubt, the HBL site referred to in this report comprises the application site area and existing CLEUD area (shown in the attached plan C as Planning Unit)
16. The HBL site has recently been the subject of a planning enforcement investigation by Oxfordshire County Council. If the CLEUD application is granted, it will establish the lawful use of the application land and provide a benchmark against which changes can be assessed to see whether a material change of use has taken place from the lawful use. If a breach of planning control is established then the county council can consider whether or not it is expedient to take formal planning enforcement action.

### **Evidence Submitted by the Applicant**

17. The four sworn affidavits and two signed statements submitted with this application are summarised under the heading Affidavits below. The applicant also submitted aerial photographs showing the site in 1994, 1999, 2004 and 2009. The decision notices for the planning consents affecting the land have been provided including conditions and related correspondence. Photographs show the site and the lorries with loads including waste and storage of materials such as pallets, reclaimed stone, mulch, fencing, piping, hardcore, rubbles and soils. Most of the photographs are undated but those that are dated were taken in 2003 and in 2006. Also submitted in support of the application were a waste carrier's licence issued in 2001 and invoices for purchase of a shredder dated 2000 and invoices for crusher rent dated 2003.

### **Evidence Submitted by Third Parties**

18. The District Council, Parish Council, Environment Agency and local residents were invited to submit any evidence that they held to prove whether the use claimed had or had not been on-going for a period of ten years. The following summarises the evidence submitted by third parties.

#### *Fulbrook Parish Council (FPC)*

19. No new evidence to bring regarding this CLEUD. Refer to the response given to the previous CLEUD application for other areas of the site in 2008

which remains pertinent (summary of the consultation response for 2008 CLEUD is given below). Any Certificate granted as a result of this application should have the same limitations placed on it as the 2008 CLEUD.

*Summary of the 2008 Consultation response by FPC*

20. Believes there is a conflict of interest in Oxfordshire County Council determining the CLEUD application while the HBL site is on the long list of sites to be considered for the new minerals and waste plan (local development framework). Due to the timescales involved this response has not been discussed at a meeting of the Parish Council and instead represents the view of three of five Councillors. One Councillor declared an interest and the other stated that 'the CLEUD is a reasonable way forward.' FPC states that this is not a suitable site for waste management. It is accepted that as part of the established business surplus materials have always been returned to the site for re-use. The waste business effectively commenced in 2003 and prior to that surplus material from the existing landscaping business was returned to the site for re-use and sorting, but not waste materials from other sources. Significant management of waste did not start until 2000 at the earliest when the screener/shredder was purchased. The large escalation occurred in 2003 with the hire of a concrete crusher, purchase of a skip lorry and advertisement of skip hire to public. The fact that a waste management licence was applied for in 2003 is evidence that prior to that HBL did not consider their activities to be significant. FPC provides the response to the 2005 planning application. FPC supplies two aerial photographs taken in 2007 showing the impact of the development on the countryside and that the area of the site given over to growing and storing plants has declined in the last three years.

*Environment Agency(EA)*

21. The earliest record that they have for waste activities in the Southern Area is November 2003 when officers visited the site. Following advice from the EA, waste exemptions were registered for various activities at the site. The registration of these exemptions never precluded the requirement to have planning permission for those activities.
22. Although the company have been registered as a waste carrier since 1992, this only permits the movement of waste from A to B. It does not relate to waste management activities at the applicant's site. It cannot be taken as proof that the company brought waste back to their own site.

*Local Resident*

23. The local resident argues that, in 2007 and 2008, there was an exhaustive review of the activity taking place at the applicant's site. This review established an unambiguous position for the future of activity at the site. There were two aspects to this. The first was a clear statement about the nature of the activity that could from then onwards take place at the site. In particular, it was established that whilst material could be stored on the site, it could not be processed there. Secondly, it was established that the material that could be stored there had to be directly the result of the contracting activity of the landscaping arm of the applicant's business. This meant that skip hire, and plant hire, could not be carried out. There was an outright rejection of any retail activity and an outright rejection of the collection of waste material for storage unconnected to the landscaping activity. The second aspect of the position established at the conclusion of the 2007/8 review was an unambiguous statement on the scale of the activity that could be conducted as to storage. That limit was set at 8600 tons of storage at any one time.
24. It is the view of the local resident that the applicant has clearly breached the activity allowed following the 2007/8 review. No substantial new evidence has been submitted in this new application for a CLEUD. Indeed the employee statements that are in the evidence supplied are dated 2007 and the photos submitted are the same as the ones submitted in the 2007 application. The essence of a valid claim for the granting of a CLEUD is that the prescribed activity has been going on for ten years without complaint or enforcement. Since the planning consent for the current nature and level of activity was only set in 2008, i.e. four years ago, it is not possible for a CLEUD to be granted, simply because the time elapsed is not long enough.

**Affidavits**

25. Affidavits submitted by the applicant are summarised below and each was submitted with an Affidavit Reference Plan.
- i. Thomas Hickman – Hickman Bros Landscapes Ltd (April 2012)
26. In 1985 I took over the land now being used, with my brother Fred to run as a landscaping and ground-works contracting business. Landscape contracting involves clearing sites and then landscaping them after development. There is usually a great range of waste to be cleared off the site such as bricks, concrete, green waste, and wood. What can be re-used is taken back to the site and other material to landfill. In some cases the waste is put into bins by other contractors on the site. Other wastes

are taken from other sources from time to time for example spent mushroom compost, sawdust from sawmills. In some cases wastes are taken direct to landfill rather than returning to Shipton Hill. The business has a number of items of heavy plant and hires in other plant from time to time; and has hired its own plant out over the past ten years. The scale of the business has been about the same for over ten years.

27. The southern and intermediate area (application site) has been used in conjunction with the landscape contracting and groundwork contracting business and ancillary activities since 1990. It has been used for the import, sorting, processing and storage of wastes since that period as well as other landscape contracting uses. Various items of waste can be seen on the aerial photographs. Also, as on other parts of the site, it has always been the case the repair and maintenance of plant vehicles and equipment takes place. Waste Haulage Licences have been held since 1990. Hardcore crushing has taken place by running plant over it or by hiring a crusher in a number of places on the site. When the screener was purchased in 2000; soil screening was predominantly taking place in the southern area. The affidavit refers to the storage of various types of waste on the application site. It also details the quantities of waste stored on site.

ii. Thomas Hibberd (April 2012)

28. I have worked for Hickman Brothers Ltd for 15 years. When waste material came back I had to sort the reusable material in the north-west area and stack it on to pallets. The remainder would be taken to the southern area and stored until it was screened. Before the screener came in 2000 we used a portable frame screener which fitted over the 7.5 tonne lorries. I can remember Fred Hickman used to drop off a bin at Blenheim Estates sawmill and collect it when it was full. About 10 years ago I took my HGV licence and subsequently went out in lorries to deliver materials and usually returned with various waste materials.
29. With regard to the southern area of the application site, top soil is stored and screening carried out to the west of the site. Landscaping materials, heaps of hardcore, crushing machine for hardcore, old vehicles, bins were stored to the eastern part of the yard. Fencing materials were stored in the southern area. There were also heaps of green waste, old wood, tree stumps etc. in the site and often this was all chipped and shredded.
30. With regard to the central intermediate area of the application site, sometimes concrete has been crushed to the east of this area. This area is also used for storage for plant, machinery, bins, skips and parking vehicles.



iii. Mr Fred Hickman (sworn in 2007)

31. My brother and I started a landscaping business in 1978. We purchased Shipton Hill in the early 1980s and moved operations there. It was second nature never to throw anything away which could be re-used. As the landscaping business grew the amount of reusable materials also grew and by the 90s became an integral part of the business. Waste from employees such as old furniture, kitchen units and garden refuse has always been brought on site. We would often take odds and ends as above to be helpful including from local landscape contractors.

iv. Colin Martin Blackwell (sworn in 2007)

32. I have worked for HBL since it was formed 29 years ago. The storage and reuse of soils has occurred since I started working at HBL. I have seen a variety of items returned to the yard for reuse or disposal. These include trees, leaves, lawn cuttings, hardcore, concrete, pipework, manhole covers, plastic sheets, window frames. Often we would clear the remaining building waste from sites because landscapers are always the last in.
33. I recall many times, waste coming in from other sources in particular green waste, soils and sawdust.
34. The southern area and central intermediate area have been used for at least 10 years for the storage, sorting, processing etc of waste materials.

v. Terry Keith Hickman (sworn in 2007)

35. I have been employed in my father's business since leaving school and have managed the yard for ten years. Ten years ago the north west area was used as a dumping ground but over the next years was used for parking and unloading of lorries, the sorting of waste and storage. Waste materials have also been tipped in the central area for sorting and storage. The nursery access has also been used for tipping and storing waste. We offered a free tip for hardcore and concrete for demolition companies and have brought in wastes, for example building wastes. The southern area has been in use for many years for dumping, sorting, processing and storage of wastes, and the parking of vehicles, plant and machinery. The central intermediate area has been used for storage of materials such as hardcore and soils.

vi. Garry Duffy (April 2012)

36. I have worked for HBL for 20 years. I have always visited the site over the last ten years and helped out with various mechanical repairs. I can confirm that the central intermediate area, southern area and north east

area have been used for general storage of landscaping and building materials, storage and sorting of waste for more than ten years. I also helped with repairing plant and machinery in these areas and still do.

37. The 2007 affidavits remain relevant as they set out the position in 2007 and there is no evidence that the uses described in those affidavits have stopped or been abandoned since that date. However, in affidavits of 20 March 2013, both Terry Hickman and Thomas Hibberd have confirmed that their affidavits of 2007 remain correct as to the present use.

### **Evidence held by Oxfordshire County Council**

38. In 2008 the County Council considered the CLEUD which established the location of the different activities taking place within the HBL site. The County Council does not hold any new evidence to contradict or make the applicant's version of events less than probable.

### **Comments of the Deputy Director for Environment and Economy (Strategy & Infrastructure Planning)**

39. I will address each of the claimed uses as set out above in turn.

***(a) use of land and structures for landscape contractor's yard including ground works contractor's yard with ancillary plant and vehicle storage, maintenance and repair; incidental hire of plant vehicles and equipment, storage and incidental distribution of landscaping materials and products***

40. The first issue to be considered in any CLEUD determination is whether the use is development at all (if it is not development at all then clearly it is lawful, provided it is not in breach of a condition on a planning permission). This use is clearly development within the meaning of the Town and Country Planning Act 1990.

41. The next issue is whether it is authorised by any of the existing permissions. The use of the southern area and the central intermediate area are not covered by any existing permissions by either the District or County Councils. Other areas of the HBL site (i.e. Central area, north-west area and Nursery access area) are authorised as landscape/groundwork contractors' yard and other ancillary uses by a CLEUD permission issued by the County Council. It seems from the evidence supplied by the applicant that the application area has been used in conjunction with the other permitted areas of landscape/groundwork contractors business for over ten years. Therefore use of those areas as landscape/groundwork contractors' yard and any ancillary uses are considered lawful and a CLEUD should be granted in respect of these uses.

42. The ancillary activities referred to in the application are the same as those in the existing CLEUD. The evidence suggests that on the balance of probability the application area has been used for the same purposes as set out in the existing CLEUD. However, officers consider that the evidence provided demonstrates that the maintenance and repair of vehicles and the incidental hire of plant and machinery has occurred solely on the site of the existing CLEUD for the continuous period of 10 years rather than on the current application site. This is supported by the three sworn affidavits provided by the applicant which are dated 2007.

***(b) Importation, sorting, processing, storage and re-use/recycling of wastes (mainly construction and demolition and green waste) and other landscaping materials***

43. Again, this is development within the meaning of the 1990 Act. It has already been established that the additional areas have been used in conjunction with the other permitted areas for over ten years. Now, the issue to be considered is whether the claimed areas has been used for the importation, sorting, storage and re-use/recycling of waste for a period of ten years.
44. The evidence suggests that on the balance of probability the application area has been used for the importation, sorting, processing, storage and re-use/recycling of waste for a period of ten years. The evidence submitted by third parties does not contradict this view. The definition of waste used by the applicant is material that, 'the holder discards or intends to discard,' and I think this is an acceptable definition for the purpose of this case.
45. However, the evidence suggests that the waste activity is both part of and ancillary to the operation of the permitted landscape/groundwork contractors' yard. The affidavits state that waste from the landscape contracting jobs has been brought back to the site and sorted processed and stored for 10 years.
46. Some of the affidavits also refer to waste from other sources being brought back to the site but are not specific about the amounts of this type of material that were brought in and when or how often this occurred. There is no persuasive evidence that waste was regularly brought back to the site from sources other than sites on which HBL operated landscape or groundworks contracts in sufficient quantities or with sufficient regularity as to amount to a material change of use. The Environment Agency has commented that although the company has been registered as a waste carrier since 1992, this only permits the movement of waste from A to B. It cannot be taken as proof that the company brought waste back to their

ownsite.

47. The evidence suggests that over ten years the waste activities on the application site have been related to waste which has come in from the applicant's landscape/groundwork contracts and has been similarly used for landscape/groundwork contracts. The limitations set out in the first Schedule at the end of this report reflect the link with only landscape/groundwork contracts.
48. It has been accepted by granting the existing CLEUD in respect of the HBL site that a limited amount of processing of green waste and hardcore has been carried out at the HBL site. It is considered that the processing of green waste and hardcore is ancillary to the landscape/groundwork contractors' operation. It is considered that on the balance of probabilities waste processing operations have occurred for 10 years with sufficient continuity to satisfy the Council that they are lawful. It is also considered that it has been proved on the balance of probabilities that the amount of waste stored on the application site is in the region of 10,000 tonnes at any one time and this waste was brought to the application through the entrance shown in Plan B1. These wastes were then processed on the application site.

## **RECOMMENDATIONS**

49. **It is RECOMMENDED that the application for a Certificate of Lawful Existing Use or Development for the use of land for i) landscape contractor's yard including ground works contractor's yard with ancillary activities and ii) the importation, sorting, processing and storage of waste for a period exceeding ten years on the southern and central intermediate area of Hickman Brothers Landscapes Ltd site, Shipton Hill, Fulbrook be approved as set out below, with a Schedule of Limitations. The uses specified in the Second Schedule are not considered as lawful.**

### **First Schedule (part 1):**

1. **The use as a landscape contractors' yard (including groundwork contractors' yard) of the land shown in plan A in the second schedule to this certificate, together with the following uses in so far as ancillary thereto:**
  - i. **plant and vehicle storage;**
  - ii. **operation of plant and equipment;**
  - iii. **for the importation, sorting, storage reuse/recycling of construction demolition and green waste and other landscape materials;**

- iv. the processing of green waste and demolition waste; including hardcore and soils to produce aggregate, usable hardcore, fines, soils, mulch and compost;
- v. screening waste to separate stone and concrete from soils;
- vi. shredding wood and green waste .

**First Schedule (part 2) - Subject to the following identified limitations:**

- Imported waste and landscaping materials are predominantly – construction demolition waste, green waste, spent mushroom compost, soils, subsoil and aggregates, chipped bark, fencing, timber, incidental metal and plastic items.
- Waste is imported to the Land shown in plan A via the land shown in plan B1.
- The amount of waste stored on the land shown in plan A has averaged 10,000 tonnes per annum.
- In conjunction with the land shown in plan B1, as at April 2012 the business operated with the following large items of plant:  
-two 12 tonne excavators, one tractor loader, a crusher, a screener and a shredder.
- In conjunction with the land shown in plan B1, no more than 6 lorries and 16 vans have been in consistent use over the 10 years period.

**Second Schedule: The Council is not satisfied that the following uses are lawful:**

- Retail sales.
- Operation of plant and equipment over and above that ordinarily ancillary to a landscaping and groundwork contractors' yard.
- Hire of plant, vehicles and equipment over and above incidental hiring of items ordinarily used for landscape and groundwork contracting.
- The hiring of skips for removal of household wastes not connected with the landscape contracting business.

PN7

MARTIN TUGWELL

Deputy Director for Environment & Economy (Strategy & Infrastructure Planning)

March 2013



Plan A \_ Cleud Application 12 / 0661 / P / CM.



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Shipton Hill, Fulbrook, OXON

Plan B1 \_ Cleud Application Number 07 / 1774 / P-CLE



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Shipton Hill, Fulbrook, OXON.

Plan C \_ The Planning Unit



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