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PLANNING DEPARTMENT DACORUM BOROUGH COUNCIL					
Ref.	13				
D.P.	D.P.	D.P.	D.P.	D.P.	D.P.
Received - 9 SEP 1998					
Comments ANNE DAVIS					

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GTN CODE: 1374
OUR REF: APP/X/97/A1910/002690
OUR REF: DPB/PM/4/15575

- 8 SEP 1998

4/144/94 LD

Dear Sir

**TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 195
LAND AT SIX TUNNELS FARM, GADDESSEN ROW, HEMEL HEMPSTEAD
APPEAL BY A ELDING & SONS**

1. I am directed by the Secretary of State for the Environment, Transport and the Regions to refer to the report of the Inspector, Mr A J J Street MA(Oxon) DipTP MRTPI, who held a local inquiry into your clients' appeal against Dacorum Borough Council's refusal to grant a lawful development certificate (LDC) for the existing use of land at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead as a Contractor's yard - including plant hire of tipping and bulk excavators; plant and commercial vehicle repairs; grit blasting and the storage of plant equipment and vehicles. By letters of 8 August 1995 and 3 January 1996 the use in respect of which a Certificate was sought was amended to: General contractor's yard, comprising plant hire of tipping and bulk excavators; plant and commercial vehicle repairs and spraying carried out in the area hatched yellow on the plan; grit blasting carried out on the area hatched blue on the plan; and the storage of plant vehicles and equipment and disused vehicles, plant and equipment used for engineering and contracting on the areas edged red and hatched green on the plan.

2. The application for a LDC was dated 10 October 1994, and was made under section 191(1)(a) of the 1990 Act, as amended.

3. A copy of the Inspector's report of the inquiry is attached to this letter and contains, in paragraphs 3 to 8, a description of the appeal site and its surroundings. The Inspector's findings of fact are set out in paragraph 60 of the report and are all accepted. His conclusions, are set out in paragraphs 61 to 75 and his recommendation in paragraph 76 of the report. A copy of those paragraphs is annexed to this letter and form part of it. The report has been carefully considered.

REASONS FOR THE DECISION

4. The onus of proof is on the appellant to show that, on the balance of probability, the uses described in paragraph 1 above had continued, without material change, throughout the

10 year period before the date of the LDC application. In this case, the Council accepted that the use of the site for commercial purposes had continued for a period of over 10 years but argued that the appellant had failed to provide a precise description of the use of the site in accordance with the terms of Circular 17/92. In particular, the level of intensity of the use of the land had not been explicitly stated for the relevant 10 year period. The Secretary of State notes that new evidence was produced at the inquiry by the appellant, including more details of the characteristics of the mixed use of the appeal site over the relevant period and that the Council questioned whether it was open to the Secretary of State to consider such evidence. The Inspector's conclusions on this point, set out in paragraph 74 of his report, are accepted for the reasons he gives. The Secretary of State is required to examine all relevant evidence made available during the appeal process and, although the evidence in question was produced at a late stage, he is satisfied that the Council had sufficient opportunity to identify, and test, the new evidence.

5. Against this background, the Secretary of State has carefully considered the Inspector's assessment of the available evidence concerning the use of the site, in the light of the various judicial authorities referred to by the parties, and accepts his conclusions, for the reasons he gives. The Secretary of State therefore agrees that, as a matter of fact and degree, the appeal site formed a single planning unit, the use of which was a mixed use, comprising four primary elements as follows:-

- i) as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment;
- ii) for the stationing of contractors vehicles, plant and equipment;
- iii) for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying;
- iv) for the long term storage of disused vehicles, plant and equipment.

6. It is also agreed, for the reasons the Inspector gives, that the documentary and witness evidence presented at the inquiry is sufficient to show, on the balance of probability, that all four components of this mixed use have continued, throughout the ten years prior to the application and although it appears that there has been some fluctuation in the level of activities taking place since 1984, including some intensification of the overall use of the site, these changes have not been such as to involve a material change of use of the land. Your clients' appeal succeeds accordingly. A LDC is being granted in terms reflecting the mixed use of the site as set out in paragraph 5 above, as the Inspector suggests; and, in the light of the guidance in Annex 8 of Circular 10/97, a description of each of the components of the mixed use of the land within the appeal site at the date of the application is being included, to provide a point of reference against which any subsequent change may be assessed. The detailed descriptions suggested by the Inspector, in paragraph 70 of his report, have been accepted but it should be noted that the Secretary of State interprets the references to "hours and days of use" as meaning the working hours or times between which the activities comprising the mixed use now found to be lawful, have been carried on during the ten year period.

FORMAL DECISION


7. For the reasons given above, the Secretary of State hereby allows your clients' appeal and grants a lawful development certificate, enclosed with this letter, for the existing use of land and buildings at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead for a mixed use, comprising four primary uses as follows:-

- i) as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment;
- ii) for the stationing of contractors vehicles, plant and equipment;
- iii) for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying;
- iv) for the long term storage of disused vehicles, plant and equipment.

RIGHT OF APPEAL AGAINST THE DECISION

6. This letter is issued as the Secretary of State's determination of the appeal. Leaflet X, enclosed for those concerned, sets out the right of appeal to the High Court against the decision.

Yours faithfully



A J WRIGHT

Authorised by the Secretary of State
to sign in that behalf

ANNEX TO DECISION LETTER

APP/X/97/A1910/002690

CONCLUSIONS

61. The legal implications of the above facts are matters for the Secretary of State, but, bearing them in mind, my conclusions are as follows.

62. In the light of my inspections and my examination of the representations I conclude, as a matter of fact and degree, that at the date of the inquiry the appeal site, comprising the areas outlined in red and hatched green, yellow and blue on Plan A, formed a single planning unit, the use of which, in brief, was as follows: a mixed use; 1. as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment; 2. for the stationing of contractors vehicles, plant and equipment; 3. for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying; and 4. for the long term storage of disused vehicles, plant and equipment.

63. The main considerations which led me to reach that conclusion are as follows. There is no evidence that the activities taking place on the appeal site are also taking place elsewhere on the farm. The appeal site appears to be used for distinct purposes. I consider that the four components of the mixed use which I have identified are of such a character and scale as to each constitute primary uses of the land. The four uses are functionally separate but do not occupy distinct and separate parts of the site. Use 1. is operated by the Appellant firm. I do not regard the contracting activities and the plant hire activities as two separate primary uses because it is clear that: they are both operated by Elding & Sons; they involve largely the same stock of vehicles, plant and equipment; they use the site in essentially the same way. Use 2. is distinguished from Use 1. as the activities are not under the direct control of Elding & Sons, but of McDermott Construction Ltd and others, and as Use 2. does not include a plant hire element.

throughout the period and that the changes which have occurred have not been such as to involve a material change in the use of the land, whether by intensification or whatever. Accordingly I conclude that the use which I have described in outline in paragraph 62 is a lawful use.

69. Section 191(1)(c) of the 1990 Act requires an applicant for a Certificate to "describe" the use and Circular 10/97 indicates that a Certificate should state the characteristics of the use so as to define it unambiguously. In my view the definition of the use set out in the Appellant's application (paragraph 1.c. above) does not meet these requirements. It is far too unspecific. However in the light of the evidence put to the inquiry I consider that a satisfactory description of the use can be provided in this case. The purpose of "describing" the use in detail is to provide a point of reference against which any future intensification of the use can be compared.

70. On this basis and in the light of all of the evidence I conclude, on the balance of probability, that a full description of each of the components of the mixed use should include the following:

- (i) Use 1. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
- Groundwork contracting;
 - stationing of; one 15 tonne lorry, two large vans; one low loader tractor unit; four trailers; one Landrover; ; one JCB; three Caterpillar tractor units with shovels; one Drott machine; three small concrete mixers.
- Plant hire;
 - hire of all of the items listed under "groundwork contracting" with the exception of the two vans, the low loader tractor unit, the four trailers and the Landrover.
- (ii) Use 2. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
- Stationing of; three lorries; four vans; two JCBs; three small dumper trucks; two rollers; 5 compressors; one small concrete mixer.
- Stationing of two four wheel lorries.
- (iii) Use 3. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday 08.00 hrs to 13.00 hrs.
- Mechanical repairs and maintenance; not more than two vehicles or items of plant or equipment under repair or maintenance on any one day.

73. In my view it would be open to the Secretary of State, should he wish to do so, to modify the description of the use the subject of the application, under Section 195(2) of the Act, to include also the wording set out in my paragraph 70 above.

74. Most of the evidence considered at the inquiry had been put to the Council before they determined the application. But some important new evidence was produced at the inquiry by the Appellant, including more details of the characteristics of the mixed use of the site over the relevant period. The Council questioned whether it is open to the Secretary of State to consider such new evidence. In my view the Secretary of State does have that discretion. The Council had the opportunity to identify, and test, the new evidence, and this they did. In my view it would not be proper for the Secretary of State to set aside relevant evidence made available to him through the appeal process. The statute requires him to decide whether a local planning authority's refusal of a Certificate was well founded. It does not require him to confine himself to examination of the local planning authority's reasons for that refusal, or to make his decision only on the basis of the evidence put to the Council at application stage.

75. Having regard to the limitations of the description of the claimed lawful use set out in the Appellant's application and to the limitations of the evidence put to the Council in the first instance I can appreciate why the Local Planning Authority decided to refuse the Certificate applied for. However in the light of all of the evidence now put to the inquiry I have concluded that the case for the granting of a Certificate has been made out. In my view a Certificate may be granted on the basis set out in paragraphs 62 and 70 above. In the circumstances I conclude that the Local Planning Authority's refusal to grant a Certificate of Lawfulness of Existing Use was not well founded.

RECOMMENDATION

76. I recommend that the appeal be allowed and that a Lawful Development Certificate be granted in the terms set out in paragraphs 62 and 70 of this report.

I have the honour to be
Sir
Your obedient Servant



INSPECTOR

DEPARTMENT OF THE ENVIRONMENT TRANSPORT AND THE REGIONS


TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT PROCEDURE) ORDER
1995
ARTICLE 24

CERTIFICATE OF LAWFUL USE OR DEVELOPMENT

IT IS HEREBY CERTIFIED that on 10 October 1994 the uses described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched black on the plan attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:-

the uses were immune from enforcement action because they had continued for a period of more than ten years before the date of the application for a certificate.

Signed 
A J WRIGHT
Authorised by the Secretary of State
to sign in that behalf

Date - 8 SEP 1998

Reference: APP/X/97/A1910/002690

First Schedule

A mixed use for:-

Use 1

Groundwork contracting - the repair, maintenance and stationing of; one 15 tonne lorry, two large vans; one low loader tractor unit; four trailers; one Land rover; one JCB; three Caterpillar tractor units with shovels; one Drott machine; three small concrete mixers. and

Plant hire - hire of all of the items listed under "groundwork contracting" with the exception of the two vans, the low loader tractor unit and the Land rover.

Carried on between the following times:-

Monday to Friday - 08.00 to 1900 hours

Saturday - 08.00 to 1300 hours

Sunday - nil

Use 2

The stationing of contractors vehicles, plant and equipment comprising; three lorries; four vans; two JCBs; three small dumper trucks; two rollers; 5 compressors; one small concrete mixer; and stationing of two four wheel lorries,

With the use of the vehicles etc carried on between the following times:-

Monday to Friday - 08.00 to 1900 hours

Saturday - 08.00 to 1300 hours

Sunday - nil

Use 3

Mechanical repairs and maintenance of commercial vehicles, plant and equipment (involving not more than two vehicles or items of plant or equipment under repair or maintenance on any one day); and
grit blasting and spraying, (involving not more than one vehicle or item of plant or equipment being sand blasted and/or sprayed on any one day).

Carried on between the following times:-

Monday to Friday - 08.00 to 1900 hours

Saturday - 08.00 to 1300 hours

Sunday - 08.00 to 1300 hours

Use 4

Long term storage of 15 disused items (a mixture of lorries; vans; JCB or Caterpillar tractor units with shovels; dumper trucks; compressors; concrete mixers).

Daily working hours associated with this use;

Monday to Friday - 08.00 to 1900 hours

Saturday - 08.00 to 1300 hours

Sunday - nil

Second Schedule

Land at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead.

IMPORTANT NOTES

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the use and operations described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, were not liable to enforcement action, under section 172 of the 1990 Act, on that date.
3. This certificate applies only to the extent of the use and operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use or operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

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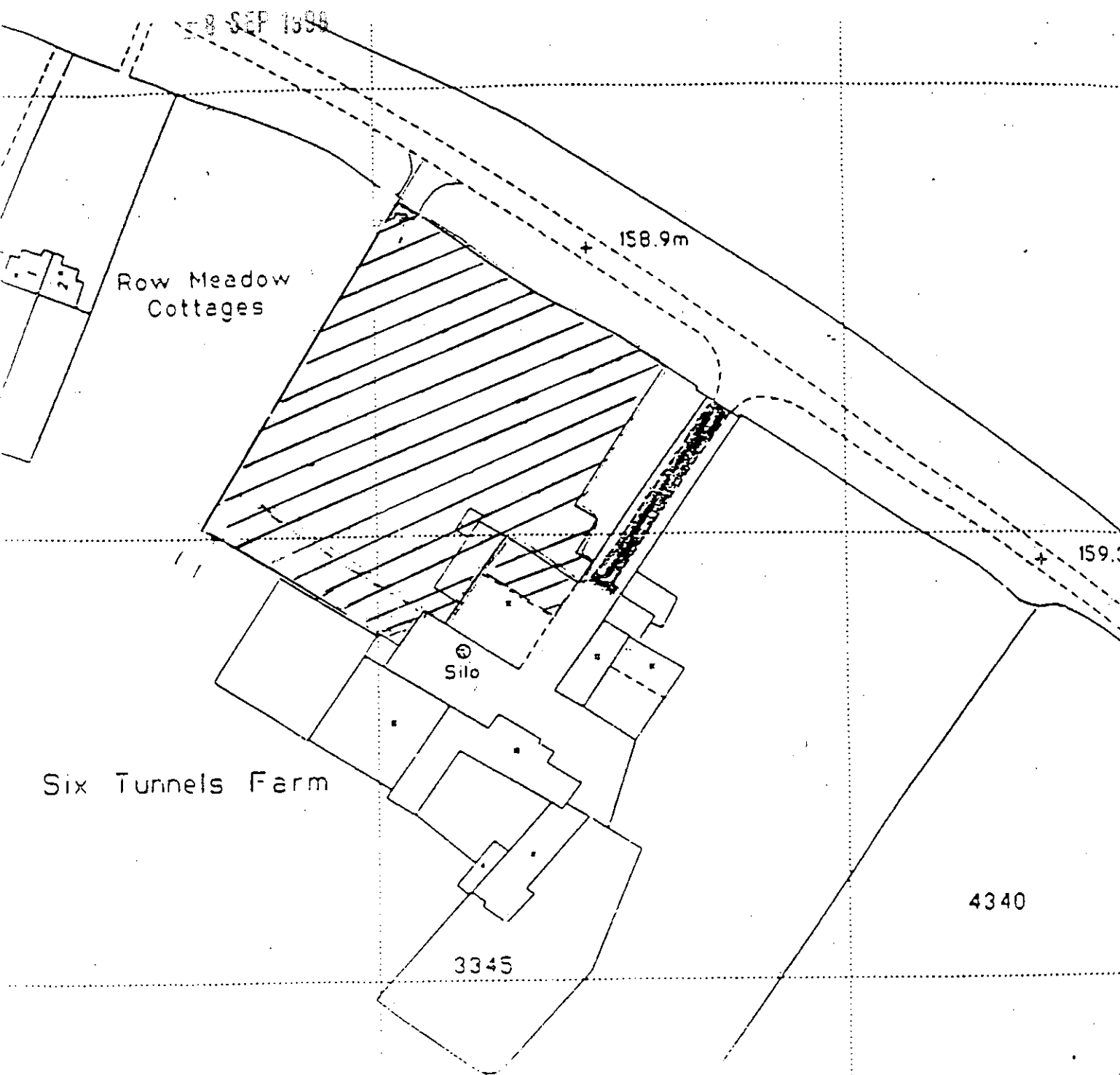
DEPARTMENT OF THE ENVIRONMENT
TRANSPORT AND THE REGIONS

This is the plan referred to in the
Secretary of State's decision letter
dated 8 SEP 1998

Reference APP/X/97/A1910/002690

A J Wright

A J WRIGHT
Authorised by the Secretary of State
to sign in that behalf.



TOWN AND COUNTRY PLANNING ACT 1990

PLANNING AND COMPENSATION ACT 1991

DACORUM BOROUGH COUNCIL

APPEAL

by

A ELDING & SONS

concerning an application for a

CERTIFICATE OF LAWFULNESS OF EXISTING USE OR DEVELOPMENT

in respect of land at

SIX TUNNELS FARM, GADDESSEN ROW, HEMEL HEMPSTEAD

Inspector: A J J Street MA(Oxon) DipTP MRTPI

Dates of Inquiry: 28 and 29 October 1997

File Reference: APP/X/97/A1910/002690

Tollgate House
Houlton Street
BRISTOL
Bs2 9DJ

22 APR 1998

To the Right Honourable John Prescott MP
Secretary of State for the Environment, Transport and the Regions

Sir

I have the honour to report that on 28 and 29 October 1997 I held an inquiry at the Council Offices, Hemel Hempstead, into an appeal by A Elding & Sons under Section 195(1)(a) of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991, against the decision by the Dacorum Borough Council to refuse an application for a Certificate of Lawful Use or Development. The site is at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead.

1. a. The application is dated 10 October 1994.
b. The application is made for a Certificate of Lawfulness of Existing Use or Development under Section 191(1)(a) of the amended Act.
c. The existing use in respect of which a Certificate was sought in the original application was:

Contractor's yard - including plant hire of tipping and bulk excavators; plant and commercial vehicle repairs; grit blasting and the storage of plant equipment and vehicles.

By letters dated 8 August 1995 and 3 January 1996 the use in respect of which a Certificate was sought was amended to:

General contractor's yard comprising plant hire of tipping and bulk excavators; plant and commercial vehicle repairs and spraying carried out in the area hatched yellow on the plan; grit blasting carried out on the area hatched blue on the plan; and the storage of plant vehicles and equipment and disused vehicles, plant and equipment used for engineering and contracting on the areas edged red and hatched green on the plan.

- d. The use of the land at the date of the application was stated to be as set out at c. above.

- e. The grounds for refusal of the application were: the information submitted is insufficient to demonstrate the intensity of the use of land as a general contractor's yard comprising plant hire of tipping and bulk excavators; and the storage of plant vehicles and equipment and disused vehicles plant and equipment used for engineering and contracting since November 1984.

2. This report includes a description of the site and its surroundings, the gist of the representations made at the inquiry, my findings of fact, conclusions and recommendation. Lists of appearances, documents plans and photographs are attached. The evidence was taken on oath.

SITE AND SURROUNDINGS

3. I inspected the site on the late afternoon of 28 October 1997 and on the afternoon of 29 October 1997.
4. The site lies in generally open countryside to the east of the small settlement of Jockey End. It is situated on the south west side of the road Gaddesden Row and its north east boundary adjoins the road. To the rear of the site are the agricultural buildings of Six Tunnels Farm and the farm house. I did not inspect these buildings.
5. The appeal land is shown on Plan A. It is roughly square in shape and about 0.5 hectare (1.3 acres) in size. The road frontage has a substantial hedge along it but the other boundaries are not demarcated physically on the ground. The access to the land is in the north corner. Most of the site comprises open ground. However in the south corner it extends into the first two bays of the 6 bay concrete framed barn building there, hatched yellow on Plan A, and it also includes a primitive open fronted lean-to pole barn shown hatched blue on Plan A. Adjoining the pole barn is a van body used as a paint store and a small compound containing compressors.
6. The site has an uneven surface. Sizeable parts, particularly focusing on the tract between the entrance from the road and the barns in the south corner, have a stoned surface. But other areas, towards the north and north east boundaries of the site and to the north of the area hatched green on Plan A, and extending in total to very roughly half of the surface area, appear to have an earth surface and were substantially overgrown with grass and other vegetation at the time of my visits.
7. At the time of my visits a substantial number of vehicles and pieces of plant and equipment were stationed on the land. Many of the vehicles and other items were in working order and use, but a number appeared to be disused. Some of the disused items appeared not to have been touched for years and were overgrown and scarcely visible. The items in working order were mostly stationed on or around the edges of the areas of stoned surface. The disused items tended to be sited in haphazard fashion on the grassed and overgrown areas. Of the working items there were: three 6 wheel lorries; three ex-army lorries; 5 diggers/excavators of the "JCB" type; one tipper lorry; three small dumper trucks; three small concrete mixers; a caravan/site office; two fork lift trucks; one farm tractor; a new agricultural plough; one small portable crane; four compressors; three skips; two pick-up vans and one "Transit" size van. Two of the road vehicles were sign-written with the Appellant's name; two lorries bore the name McDermott Construction Ltd. The apparently disused items included: a large van body; a large mobile crane dating from 1949; a trackless excavator; four tractors, mostly farm type; a tractor cab; a muck spreader; an abandoned car and van; a trailer; two ploughs; several excavator buckets; a pile of old tyres.
8. The pole barn contained simple grit-blasting equipment. The two bays of the concrete frame barn contained a compressor which was being repaired.

UNDISPUTED FACTS

9. The Council agreed, in January 1997, that the use of the site for commercial purposes had endured for a period of over 10 years (Document 9).

10. The Council informed the Appellant at the same time that in the case of the use of the building hatched yellow for commercial vehicle and plant repairs and the use of the building hatched blue for commercial sandblasting a good case had been made out for the grant of a Certificate of lawful use, subject to hours of use limitations (Document 9).

INITIAL SUBMISSIONS

11. At the start of the inquiry I requested the Appellant's side to explain to me what the claimed lawful use of the land represented in terms of planning unit(s) and primary and ancillary uses. I asked the Council to comment also.

The material points were:

Mr Bromley for the Appellant

12. The area edged red and hatched green on Plan A served the groundwork contracting business of Elding & Sons. The contracting vehicles and plant were also hired out. There was ancillary parking of vehicles. Disused vehicles, plant and equipment was stored too, to be "cannibalised" for parts for working items. This was a composite use. The yard was also used by other firms, in particular by McDermott Construction Ltd, for the parking and storage of vehicles and plant. McDermott's vehicles were also repaired by Elding & Sons. The barn hatched yellow was used by Eldings for the repair of their own vehicles and plant and for the repair of commercial vehicles and plant owned by others. The repair and maintenance work also extended into the open yard. There was no segregation of activities and uses within the yard. Vehicles and plant were just stationed on the best spot available at any one time. It was appreciated that it was necessary to establish a "point of reference" or "benchmark" for the level of use of the site, against which future changes could be judged, and that the level might well be the one that had existed 10 years before the date of the application for the Certificate.

Mrs Walker for the Council

13. It was accepted that there was a contracting business operating from the site and that the plant concerned was hired out when not required by Elding & Sons. But the Council were not sure about what parts of the land were used for those purposes or about the intensity of the use. These were vital points as this was a large site and much of it was not intensively used at present. The Council were also aware of the repairs use. But they were not clear as to the extent to which it was a primary use or an ancillary use, or about hours of usage. They had only just heard the claim that items were repaired in the open yard and they had no evidence on that. They disputed that the storage use by other contractors had been going on for more than 10 years and they were not clear as to the intensity of that use. They were very uncertain about the significance of the fact that much of the site was occupied by disused vehicles; they were uncertain about the extent of the areas so used and about the nature of the use. To assess exactly what use might be lawful it was necessary to establish what levels of what activities had been undertaken on a year by year basis over the relevant period. The Appellant had not provided that information. The Secretary of State had a narrow role; to decide whether the Councils' decision had been well founded. It was not for him to go into new evidence.

OPENING SUBMISSIONS FOR THE APPELLANT

The material points were:

Mr Bromley

14. The Council had accepted that commercial use had taken place and that it had included repairs and sand blasting activities. They had helpfully narrowed down the issues in other ways also. For example the extent of the yard was accepted, as was the fact that vehicles, plant and equipment had been stored there. The only issue was the level of use of the yard. The use did not fall into a Use Class; it had been untidy; and ad hoc. But that did not prevent a Certificate being issued. The Secretary of State did not have to establish absolute facts. He had to work on the balance of probability. On that basis the Appellant's case had been proved. The extent, nature and general level of activity had been shown.

THE EVIDENCE FOR THE APPELLANT

The material points were:

Mr Corby - Evidence in Chief

15. He submitted his Statutory Declaration (Document 4/App 3). He had known the area for a very long time and had been past the site at least six times a year since 1967. He had seen a substantial number of commercial vehicles, plant and earth moving equipment on the site and had seen vehicle repair work being undertaken there throughout that time. He knew that the Elding family had run their general commercial vehicle and machinery contracting and maintenance business from the site since 1957.

Mr Corby - Cross-examined by Mrs Walker

16. He had passed by the site at many different times of the day. There had always been a mixture of agricultural vehicles and contracting vehicles there. Very roughly the split had been 50/50. He had been on the site itself - perhaps 12 times since 1984. The land had always had the appearance it had at the time of the inquiry.

Mr Corby - Questioned by me

17. He had no detailed knowledge of the activities of Elding and Sons, for example as to the numbers of vehicles stationed on the land at various times. He judged that the business had come into existence in the first place because there had been 6 brothers on a farm of only 200 acres and thus a need for additional work.

Mr Bromley - Evidence in Chief

18. He submitted his proof of evidence and Appendices (Document 4). Whilst most activity related to repairs and spraying was carried out within the buildings referred to some work was done in the open, for example the spraying of water bowsters, as photographs showed (Document 5/APP 5). Documentary evidence put in by the witness in support of the Appellant's case comprised: a Declaration by Mr T McDermott relating to his company's use of the site; the Statutory Declaration of Mr Corby; letters from three former employees of Elding & Sons and from Stathams Garage relating to the past use of the site; a letter from the Council of 1982 confirming

commercial activity at the farm; a letter of 1994 from the Council confirming an officer's personal knowledge that the storage and maintenance of motor vehicles and the sand blasting of motor vehicles had been carried on since before 1984; and air photographs of 1980 and 1988.

19. The air photographs (Photograph 1) had obvious limitations, not least that they had been taken at times of the day when many items would not have been on site. They could not be relied upon as primary evidence. But they gave an indication of levels of use. The 1980 picture showed about 28 items within the area edged red on Plan A and a further 20 on the land to the west. The 1988 picture showed about 39 items within the areas edged red and hatched green and a further 7 on the land to the west.

Mr Bromley, Cross-examined by Mrs Walker

20. The application related to the land only and not to the buildings upon it as such. He did not know how long the "rotting hulks" of disused vehicles and plant had been on the site. A substantial part of the yard surface was not being actively used for business purposes now and had not been in the past. There were a number of agricultural vehicles and items of agricultural equipment on the site which had not been used for a long time. Some agricultural items were used in the contracting business.

21. The evidence about outside repairs had been put to the Council before the inquiry; but the 1988 air photograph had not. The Government Circulars relating to Certificates did require uses to be defined in detail. But the sui generis use involved in this case was very varied and complicated and difficult to be precise about. It was not possible to distinguish agricultural vehicles and equipment used on the farm from contracting vehicles and equipment on the air photographs submitted. Comparison of the three air photographs for 1980, 1988 and 1990 (the 1990 photograph is at Photograph 1) did show that the vehicle storage/parking area at the farm had contracted over the years, into the area of the appeal site.

22. The hours of working of the commercial vehicle repair use were the same as those of the sand blasting use: Monday to Friday 08.00 hrs - 19.00 hrs; Saturdays and Sundays 08.00 hrs - 13.00 hrs. The Appellant had not been able to supply precise evidence on numbers of vehicles and plant stationed on the land on a yearly basis - the numbers had varied all the time and records had not been kept. Moreover vehicles had been bought in over the years just to be cannibalised for spares and there were no records of these or of old disused vehicles kept on the land in the past. However Mr Elding had confirmed that the contracting business had operated 9 vehicles over the relevant period 1984 - 94 and he had given details of those. The Appellant had never been asked to supply details of employment numbers before. The 1984 and 1985 invoices supplied to the inquiry relating to repair work and plant hire were just a random sample and were not the total possessed by the Appellant. No analysis of the available invoices had been done in support of the application for a Certificate - one problem was the lack of records, especially about disused vehicles. They had not been asked to provide more detailed information about the scale and intensity of the plant hire use. The plant hire business had involved the hiring out of Elding's contracting vehicles and plant when they were not being used by the Appellant.

23. The Council had indeed sent several requests to the Appellant for more information about the uses. More information had been provided, as much as they could. McDermott Construction Ltd had provided a list of

vehicles and plant which they said had been stored on the land (Document 4/APP 2/TM 2). Where that list referred to items stored from a particular date "onwards" that word meant up to January 1996. Some of the items referred to had not been on the site for the whole of the period 1984 - 94. The list was not complete either, in that McDermott's had also parked operational vehicles on the site overnight, and still did. To his knowledge they currently parked three lorries on the land. The letters from former employees (Document 4/App4-6) did not go into any detail about the past use of the site.

Mr F E Elding - Evidence in Chief

24. He submitted his proof of evidence and Appendices (Document 5). He had lived at Six Tunnels Farm since 1927. Elding & Sons had operated a contractors business from the farm since before 1963. This had been their only operating centre. The business comprised: plant hire, bulk excavation, tipping, plant and commercial vehicle repairs, grit blasting and storage of plant and equipment and vehicles. They had built up a large number of clients in the building and civil engineering construction field. The yard had originally extended to the area edged red on Plan A. In 1982 it had been extended to include the area hatched green on that plan. The storage and parking of items in the yard was on a random basis.

25. In 1984 Elding & Sons had the following working vehicles based at the site: one 15 tonne rigid lorry; two large vans; one low loader tractor unit; four trailers for moving plant; one Landrover. At that time their working plant and equipment had comprised: one JCB; three Caterpillar tractor units with shovels; one Drott machine (a machine similar to the JCB and Caterpillar units); cement mixers. They had continued with the same kind of business and had kept a similar quantity of vehicles, plant and equipment ever since then. Document 12 was four invoice books covering the period 1983 - 85 and illustrating general contracting work carried out by Elding & Sons over that period.

26. All of Elding's working plant and equipment, together with the 15 tonne lorry, had been available for hire in 1984. Document 11 was a bundle of plant hire invoices covering the period 1983 - 85. The Appellant had run the plant hire enterprise on the same sort of scale ever since then.

27. Mr T McDermott's Declaration (Document 4/APP 2) confirmed that his firm had parked and stored vehicles, plant and equipment on the appeal site since 1974. They were civil engineering contractors. That firm had its offices and a small yard at Dunstable but those premises were too small to hold all of their equipment. Currently they parked three or four lorries and two or three small vans on the land overnight and they stored plant there too. That firm had also stored building materials, but only intermittently. Many other contractors had also stored plant and equipment on the site over the years. Adder Plant had used the site for four or 5 years to store a number of small items. The other contractors listed had used the land for just a few months. Photographs taken in the 1980s and 1990s showed a typical usage of the site (Document 5/APP 5). The photographs did not show much agricultural equipment. But farm tractors were used occasionally for contracting work. The farm was mostly pasture and so the range of farm equipment was limited - one or two tractors and trailers, a grass cutter and bailer and a fork lift truck.

28. An account book (Document 10) summarised commercial vehicle and plant repair work undertaken over the period 1977 - 89 in the two bays of the

barn shown hatched yellow on Plan A and in the adjoining pole barn. About one or two vehicles or items were under repair or servicing on an average day. The intensity of the use had not changed much over the years from before 1984. About one vehicle or other item was undergoing sand blasting and spraying treatment on an average day. It took two or three days to complete the job of sand blasting and spraying an item. The land outside the buildings was used periodically for repair work, for example if the weather was nice, and items awaiting repair/collection were stationed on that land also.

29. He agreed with Mr Bromley's evidence (paragraph 19 above) about the number of items of plant and equipment shown on the site and on adjoining land nearby on the 1980 and 1988 air pictures. When allowance was made for vehicles not likely to have been on site when those pictures had been taken the figures represented a reasonable measure of the intensity of the use of the site over the years. There had been fluctuations over the years in the levels of activity of different parts of the business, but no major changes. The overall level of activity at the present time was perhaps about 20 per cent above the level of say 1984.

Mr Elding, Cross-examined by Mrs Walker

30. The mechanical repairs and the sand blasting activities worked the same hours. Although his evidence qualified the 1984 list of working vehicles with the word "included" the list shown had in fact been the total number of vehicles in use at that date. The firm no longer had a commercial vehicle operator's licence. The nature of the business had not changed. It was just that they no longer had their own low loader tractor unit. When they wished to move plant they hired a lorry. They still ran a plant hire operation. He considered that a bundle of invoices did provide proof that vehicles were hired from the appeal site. He had not kept lists of the plant and vehicles owned by the company - he had worked out the 1984 list, produced in evidence, from the invoices. He could have done that for 1994 if he had been asked.

31. The company still had a Drott machine. Some of the vehicles and items of plant on the site were both stored there and available for cannibalisation. He could not say what proportion of the items on site which were stored and unused were beyond re-use. Some of the items buried in vegetation might still be capable of re-use. None were of historic value. None of the items were "junk". About 10 per cent of the items constituted agricultural equipment. Very little of the equipment was used both for farming and for the contracting business.

32. Currently one vehicle or other item was on the premises for sand blasting on an average day. About one or two vehicles or items of plant were under repair each day - there was always something in being repaired. Some of the work was on Elding's own vehicles and equipment, but most was for outside contractors.

33. He could not say what percentage increase there had been in activity on the site since 1984, but it had not been very great. He could not tell from the air photographs what items were what. Other contractors still used the site for storage, if there was space. Certainly more plant could be stored on the land, if the disused items were removed.

Mr Elding, Re-examined by Mr Bromley

34. An operators licence was not needed for a 15 tonne lorry or for large vans. The company still owned: a JCB; three Caterpillar units with shovels; a Drott machine; two large vans; two trailers and a Landrover. Old disused plant was removed from the site occasionally.

Mr Elding, Questioned by me

35. The administration of the business was done from the farmhouse. The working farm vehicles and machines were kept in another yard. The 15 tonne lorry was used for earth moving. The four trailers owned in 1984 were for use with the low-loader tractor unit, to move plant. Employment was 8 at present - 5 brothers and three employees. It had been up to 10 in the past. The limited amount of farm work was shared out between the brothers. There had been little change over the years in the various components of the use of the yard.

THE EVIDENCE FOR THE LOCAL PLANNING AUTHORITY

The material points were:

Mrs H M Higenbottam, Evidence in Chief

36. She submitted her proof of evidence and Appendices (Document 8). Circular 17/92 made clear that the onus of proof was on the Appellant: the LPA need not go to great lengths to show that the use claimed was not lawful. In this case the Council had made available what information they had and had made numerous suggestions as to what information the Appellant should supply to strengthen its case. This had not all been submitted. The Council had also been mindful of the Circular advice requiring claimed uses to be described precisely and for the limits of the use at a particular date to be set out. Bearing in mind R v Sheffield City Council (July 1994 TLR) the Council were also concerned that a certificate should not be granted in terms which were too wide.

37. In this case the level of intensity of the use of the land had never been explicitly stated for the relevant period November 1984 - November 1994. Vehicles, plant and uses had not been tied to the site at relevant dates. The numbers of disused vehicles, plant and equipment stored over the relevant period had never been stated. It had been agreed that there had been commercial use of the land over the 10 years. A good case had been made out for the granting of a certificate for the use of the land hatched yellow and blue for repairs and sand blasting respectively, subject to hours of use. But sufficient evidence had not been supplied about the intensity of the claimed use for plant hire of tipping and excavating vehicles. The air photographs of 1972, 1980, 1988 and 1990 (Document 8/Appendix D and Photograph 1) showed that over the years there had been a change in the number of items stationed on the site and in the intensity of the use of the site. The area of stoned hardstanding had also increased. The Council's refusal of a Certificate was well founded and a Certificate should not be granted.

Mrs Higenbottam, Cross-examined by Mr Bromley

38. The Parish Council had been notified of the application for a Certificate and had not commented on the matter. Not a great deal of new

evidence had been provided by the Appellant at the inquiry. Some points had been expanded and clarified - for example the fact that the Appellant no longer possessed a low loader tractor unit. But had the new information now provided been put to the Council earlier it would not have changed their decision - the use still had not been described fully. The witness had more questions about the use now than she had been aware of before the inquiry. For example the new information about items being stored on the land for cannibalisation appeared to introduce a new use, with elements of a scrapyard about it.

39. It was not accepted that the repair activities had ancillary parking and storage outside the buildings - if it was a question of one or two vehicles or items a day being dealt with that would not create any sizeable ancillary parking. Although the air photographs did show items stationed on the land they did not really prove much as to the precise nature or purposes of the stationing. Comparison of the 1980 and 1990 photographs did suggest that the area of "storage" use at the farm had contracted into the appeal site. Much equipment would have been off site at the times when the photographs had been taken.

40. The Appellant had provided information for 1984 but little for subsequent dates. The McDermott list showed that some of their equipment stationed on the land in 1984 had been sold before 1994. Mr Elding had indeed given oral evidence about changes since 1984 but he had concentrated on numbers of vehicles and plant and had said very little about how the actual uses and activities had changed. This was not just a contractor's yard. There was "storage" too but what that involved was far from clear. The Council accepted all of the evidence which had been produced and did not dispute the yard boundaries. But the intensity of the uses had not been defined and in a big yard that was very unsatisfactory - if the low key "storage" items were removed many more working vehicles and items of plant could be stationed there.

41. The Council could not have issued a Certificate for the sand blasting, spraying and repair activities alone. The whole site went together, evidently with ancillary use of the yard in association with the repairs and sand blasting activities, for example.

Mrs Higenbottam, Re-examined by Mrs Walker

42. In making their decision the Council had been guided by Circular 17/92. The new Circular 10/97 was to the same effect. It was only in respect of the sand blasting activity that the Council had possessed full information, for example on hours of use, when they had determined the application. Hours of use for the repair activities had not been provided until the inquiry. The Council could not reasonably have issued a Certificate relating to only about 5 percent of the activities on the appeal site.

Mrs Higenbottam, Questioned by me

43. The contractor's use appeared to be short term "storage", or parking. She had understood that the "storage" of disused plant had been a long term matter. But now it was said that some of the disused items were cannibalised and that seemed to be more than "storage". The presence of the big old 1949 crane appeared to be another sort of storage - almost of waste disposal. The Appellant's description of the use was not sufficiently specific. It was not clear, for example, what a "general

contractors yard" was. She was uncertain as to what sorts of contracts and what sorts of business were involved.

CLOSING SUBMISSIONS FOR THE LOCAL PLANNING AUTHORITY

The material points were:

44. For the application to be successful the Appellant had to show that the claimed use had begun more than 10 years before the date of the application, that was before October 1984. The burden of proof was firmly on the Appellant. Despite the Council's protracted efforts to assist the firm had failed to discharge that burden. Most of the evidence presented had related to 1984, not to the following 10 years.

45. The Council could not have issued a modified, more limited, Certificate under Section 191(4) of the Act. The only bit of the site for which they were satisfied that adequate evidence had been provided was the sand blasting building. It would not have been sensible to give a Certificate for one small element of a complex mixed use. Moreover, had they issued such a Certificate they would have been out of line with Circular advice - such a radical reduction of the scope of the application would not have been a "slight" alteration in the terms of Annex 8.35 to Circular 10/97. In any event the sand blasting activity might not be a primary use of the land, but only an ancillary.

46. The Appellant had failed to provide a "precise" description of the use as required by Circular 17/92 paragraph 22. To permit the use claimed in the form applied for would be to write a "blank cheque". The use was more complex than the Appellant seemed to realise. The purpose of the "storage" of items was important. "Storage" in terms of the overnight parking of vehicles was not the same as the long term stationing of a disused vehicle to provide spare parts. There were at least three kinds of "storage" on the site. There was the stationing of long disused items on the land - perhaps not a use at all. There was the stationing of items on a long term basis to be used for spares. This was perhaps an ancillary to the repair activities on the site, but no specific evidence had been given about it so it was hard to say. Thirdly there was the short term - generally - parking of vehicles and plant actively used in the business.

47. The Council accepted that commercial activities had been going on, but the intensity of the uses had not been defined for the relevant period. The site might have been run on an ad hoc basis and the firm's records might be poor. But that did not allow the Council to grant a Certificate on the basis of assumptions. The invoices put in did not themselves prove that a business had been run from the appeal site. The Appellant had failed to do any analysis of the invoices to clarify the intensity of the use. The site had been used for the stationing of farm vehicles and this had not been distinguished. There was much potential to use the land more intensively for its present purposes. The Council had to be careful also not to grant a Certificate for a use wider in scope than had actually existed. Hours of business for the vehicle and plant repair use had only been produced at the inquiry. Mr Bromley's final statements about the hours of business of the yard amounted to unsubstantiated new evidence given in final submissions.

48. The Inspector had suggested that one alternative way in which the use of the site at the date of the application might possibly be described, in planning terms, was as follows: a mixed use; 1. as a base for a groundwork

contractor's business, comprising the parking and storage of vehicles, plant and equipment and the maintenance of that equipment; 2. as a base for a plant hire enterprise; 3. for the parking and storage of contractors' vehicles, plant and equipment; 4. for the repair of commercial vehicles and plant, and grit blasting and spraying; 5. for the long term stationing/disposal of vehicles, plant and equipment. The Council were not able to comment on these suggestions. Certainly there were such activities. But without more evidence they could not say whether the uses referred to were primary uses or how those activities had changed over the years.

49. Certainly some more specific evidence had been produced at the inquiry. But it was still not sufficient. Moreover it was not open to the Secretary of State to consider new evidence.

50. The Appellant had attempted to define the overall intensity of the commercial use of the site over the years by reference to the number of vehicles and other items of plant and equipment which could be seen on the air photographs. This analysis was not accepted. It was impossible to tell from the pictures what many of the items were or how long they had been in place. The purposes for which they were stationed were also not evident. Some of the items could have been old and disused farm equipment. There were some of these on site now, and old cars. The figures advanced for 1990 in Mr Bromley's final submissions were new and untested evidence (Document 6). Furthermore the 1990 figures showed a 30 percent increase over the 1988 figure - arguably an indication that a material change of use had taken place. Moreover the suggested yardstick figure of 75 vehicles/machines/items of plant/items of equipment was too high. If one of the totals figures was to be used - and none was accepted - it should be the lowest, 62. The appeal should fail.

CLOSING SUBMISSIONS FOR THE APPELLANT

The material points were:

51. The use of the appeal site was one falling within the second category defined in the case of *Burdle v SSE* (Document 3) - a site used for a number of activities; a composite use where it was not possible to say that one use was ancillary to another. Even the repair and sand blasting activities were not closely confined to the buildings referred to, but spilled out into the yard where there was also parking ancillary to those activities.

52. The Council had accepted much of the Appellant's case. They had accepted that the planning unit to be considered was the yard area. They had accepted that the yard had enjoyed a commercial use for a great many years. They had accepted that the repair and sand blasting activities were lawful. Mr Elding had provided more information on times of use and on intensity. The Council had not disagreed with any of the evidence as such. The Parish Council had not disputed the claim of lawful use.

53. All that was left was the vexed question of the intensity of the use. This was difficult to define. Vehicles and other items had always been parked or stored randomly. No lists had ever been kept. The fact that some items were being stationed on the land awaiting repair while others were being stored on a long term basis was not very significant. The use was parking - generally short term - or storage - generally longer term - and "why?" was irrelevant. Whether plant was stored to be used later or

stored to be cannibalised later was not significant - it was still a use for the storage of plant.

54. To sort out the question of the intensity of the use the Inspector would have to adopt a robust approach. If a "benchmark" was required the total number of items of plant and equipment and the number of vehicles on the site should be looked at. Notwithstanding the Councils' views the series of air photographs provided the basis for such a benchmark. They showed a consistent picture, albeit they were all taken in the middle of the day when many of the contracting vehicles and other items of equipment would have been elsewhere. Allowing in the early years for items stored outside the appeal site the total number of items was about 62/63 in 1980 and in 1988 and about 82/83 in 1990 (Document 6). An appropriate 10 year average or benchmark would be 75 items.

55. If the Inspector decided against a robust approach the evidence submitted allowed other estimates of the intensity of the use to be assembled. Parking of vehicles and other equipment ancillary to the repair and sand blasting activities had involved one or two vehicles at any one time. The Elding and Sons contracting equipment had comprised: a JCB; Three Caterpillar units; one Drott machine; four trailers; concrete mixers; a 15 tonne lorry; two large vans and a Landrover. Until recently there had been a low loader tractor unit too. The McDermott storage had comprised the first 9 items on their list (Document 4/APP 2/TM 2); plus the overnight parking of three to four lorries and two vans. An allowance should also be made for items stored on the site for cannibalisation. Cannibalisation was not a new matter - the McDermott list referred to "vehicles and plant for spares". Some allowance should be made too for other items stored on site of which the Appellant could not provide a full list - such as the 1949 mobile crane. Agricultural equipment had only formed a small part of the vehicles and plant stored. Days and hours of use of the yard were the same as those described for the use of the buildings. However Sunday use of the yard might well just be in connection with the repair activities.

56. The description of the claimed use in the Appellant's application was soundly based. Elding & Sons were groundwork contractors; McDermott's were civil engineering contractors. So that was the basis for the description "general contractors yard". More specifically that meant: storage of plant and equipment; plant hire; repairs and sandblasting. The Appellant had tried to make the description as specific as possible.

57. If the terms of the application needed to be changed there were ample powers to make changes. Section 191(4) of the Act required Councils to modify applications if it was necessary. The use of the word "shall" in the statute implied compulsion. Regardless of what the Circular said there was nothing in the Act to suggest that only minor changes could be made. The Secretary of State had the same powers as the Council. If he found that the Council's decision had not been well founded then he could issue a Certificate which need not be in the terms applied for. If the Inspector decided against recommending the granting of a Certificate for all of the elements of the mixed use then he could certainly recommend a more limited Certificate, just covering the repair, sand blasting and spraying uses. If he could not define a suitable area of land to which that more limited Certificate should relate, an area extending outside the repair buildings themselves, then he was asked to recommend a Certificate covering the buildings only. The extent of any ancillary land outside the buildings could be a matter for further evidence at a later date.

58. The Appellant agreed generally with the Inspector's suggestions as alternative ways in which the claimed use might be described (paragraph 48 above). The levels of activity for the contracting use and the plant hire use by Elding & Sons plainly made those primary uses of the land. McDermott's were also a separate primary use within the mixed use. It was fair to put all of the repair activities together as a single primary use - they were all related. They accepted that the part use of the site as a "graveyard" for old equipment involved very long term stationing of equipment on the site.

59. The appeal should be allowed.

FINDINGS OF FACT

60. I find the following facts:

- i. facts as to the site and its surroundings are set out in paragraphs 3 - 8 of this report;
- ii. undisputed facts as to the Council's stance about some aspects of the history of the use are set out at paragraphs 9 - 10 of this report.

CONCLUSIONS

61. The legal implications of the above facts are matters for the Secretary of State, but, bearing them in mind, my conclusions are as follows.

62. In the light of my inspections and my examination of the representations I conclude, as a matter of fact and degree, that at the date of the inquiry the appeal site, comprising the areas outlined in red and hatched green, yellow and blue on Plan A, formed a single planning unit, the use of which, in brief, was as follows: a mixed use; 1. as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment; 2. for the stationing of contractors vehicles, plant and equipment; 3. for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying; and 4. for the long term storage of disused vehicles, plant and equipment.

63. The main considerations which led me to reach that conclusion are as follows. There is no evidence that the activities taking place on the appeal site are also taking place elsewhere on the farm. The appeal site appears to be used for distinct purposes. I consider that the four components of the mixed use which I have identified are of such a character and scale as to each constitute primary uses of the land. The four uses are functionally separate but do not occupy distinct and separate parts of the site. Use 1. is operated by the Appellant firm. I do not regard the contracting activities and the plant hire activities as two separate primary uses because it is clear that: they are both operated by Elding & Sons; they involve largely the same stock of vehicles, plant and equipment; they use the site in essentially the same way. Use 2. is distinguished from Use 1. as the activities are not under the direct control of Elding & Sons, but of McDermott Construction Ltd and others, and as Use 2. does not include a plant hire element.

64. With regard to Use 3. I conclude that the greater part of the repair activity taking place at the appeal site involves the provision of repair services to customers not based at Six Tunnels Farm. I do not view the mechanical repairs and the grit blasting activities as separate primary uses as they are closely linked functionally and are both activities of a general industrial kind. Use 3. takes place mainly in the buildings in the south corner of the site, but I find that some repair activity, and parking ancillary to the use, takes place in the yard. Use 1. also involves repair activities. In all these circumstances I find Use 3. to be one component of the mixed use of the appeal site planning unit and not a sole primary use of a separate planning unit comprising the buildings hatched on Plan A. As to Use 4. it is clear that at the time of the inquiry substantial parts of the appeal site were used for the long term stationing of disused vehicles, plant and equipment. Although many of these items may have been actively used in the Appellant's enterprises in the past I consider that they no longer form part of Use 1., or indeed of Uses 2. and 3. Use 4. is essentially a form of waste disposal of discarded items, with a very low level of activity. The Appellant referred to the cannibalisation of these items but very little evidence was produced about that and I regard it as de minimis. The disused items also include a small proportion of farm equipment, not much related to the other activities in the yard.

65. I conclude also, on the balance of probability, that the mixed use of the appeal site at the date of the inquiry, which I have described briefly in paragraph 62 above, was also taking place at the date of the Appellants application to the Council, 10 October 1994, and at the dates of the subsequent amendments to the application, 8 August 1995 and 3 January 1996.

66. Comparing the definition of the use of the appeal site set out at paragraph 62 with the Appellant's description of the use in the original application and the amended application I take the view that the Appellant's descriptions do not define properly what was going on on the land at the relevant time. However I am in no doubt that the application and amended application were intended to label the self same use that I have identified. In the circumstances I consider that, should he wish to do so, it would be open to the Secretary of State, under Section 195(2) of the 1990 Act, to modify the description of the use set out in the Appellant's application to include the wording set out in my paragraph 62.

67. I now consider whether the use which I have described in outline in paragraph 62 was lawful at the date of the application. For it to be lawful the Appellant has to show that the use of the planning unit at the date of the application, or a use not materially different from it, began more than 10 years before the date of the application, that is, essentially, before 10 October 1984.

68. A substantial amount of evidence was produced for the Appellant firm, including relevant contemporary documentation, about the use of the site for the period before and around October 1984. From this evidence I am in no doubt that at that time the appeal site formed a separate planning unit in use for a mixed use comprising the four primary uses which I have identified as taking place at the date of the inquiry and of the application. It appears that there have been some changes to the activities taking place on the site since 1984, including some intensification of the overall use of the site, as evidenced by the sequence of air photographs, and changes to the stock of vehicles associated with Elding and Sons's groundwork contracting activities. However I conclude that all four components of the mixed use have continued

throughout the period and that the changes which have occurred have not been such as to involve a material change in the use of the land, whether by intensification or whatever. Accordingly I conclude that the use which I have described in outline in paragraph 62 is a lawful use.

69. Section 191(1)(c) of the 1990 Act requires an applicant for a Certificate to "describe" the use and Circular 10/97 indicates that a Certificate should state the characteristics of the use so as to define it unambiguously. In my view the definition of the use set out in the Appellant's application (paragraph 1.c. above) does not meet these requirements. It is far too unspecific. However in the light of the evidence put to the inquiry I consider that a satisfactory description of the use can be provided in this case. The purpose of "describing" the use in detail is to provide a point of reference against which any future intensification of the use can be compared.

70. On this basis and in the light of all of the evidence I conclude, on the balance of probability, that a full description of each of the components of the mixed use should include the following:

- (i) Use 1. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
 - Groundwork contracting;
 - stationing of; one 15 tonne lorry, two large vans; one low loader tractor unit; four trailers; one Landrover; ; one JCB; three Caterpillar tractor units with shovels; one Drott machine; three small concrete mixers.
 - Plant hire;
 - hire of all of the items listed under "groundwork contracting" with the exception of the two vans, the low loader tractor unit, the four trailers and the Landrover.
- (ii) Use 2. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
 - Stationing of; three lorries; four vans; two JCBs; three small dumper trucks; two rollers; 5 compressors; one small concrete mixer.
 - Stationing of two four wheel lorries.
- (iii) Use 3. - Days and hours of use:
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday 08.00 hrs to 13.00 hrs.
 - Mechanical repairs and maintenance; not more than two vehicles or items of plant or equipment under repair or maintenance on any one day.

- grit blasting and spraying; not more than one vehicle or item of plant or equipment being sand blasted and/or sprayed on any one day.

(iv) Use 4. - Days and hours of use:

- Monday to Friday 08.00 hrs to 19.00 hrs
- Saturday 08.00 hrs to 13.00 hrs
- Sunday no use.
- Long term storage of 15 disused items (a mixture of lorries; vans; JCB or Caterpillar tractor units with shovels; dumper trucks; compressors; concrete mixers).

71. The main considerations which led me to the descriptions set out in paragraph 70 are as follows. I take the view that the level of use to be described in this case should be that existing 10 years before the date of the application, that is on 10 October 1984. I have proceeded on that basis. There is no evidence that the level of use of the site was greater at an earlier date. I have reached my conclusions as to the scale of each of the primary uses in 1984 on the basis of the specific evidence relating to each use considered at the inquiry. I have not used an overall measure of intensity based on the evidence of the air photographs, as suggested by the Appellant. Although the air pictures do provide important information they give no indication of the purposes for which items visible on the photographs were stationed on the land and the information they show cannot be related directly to the other more specific evidence concerned with individual primary uses. As to Use 1. good evidence was put in for the Appellant concerning the quantity of vehicles, plant and equipment used in the contracting and plant hire activities at the relevant time. In my view that provides a reasonable measure of the level and character of Use 1. then. Regarding Use 2. the information produced by McDermott Construction Ltd gives a reasonable indication of the quantity of vehicles, plant and equipment stationed on the site by that firm in the early 1980s. I have used that as the basis for my description of Use 2. Little specific evidence was provided about the level of use of the site by other firms. Such use appears to have been generally small in scale by comparison with the use by McDermott's. I consider it appropriate to list two four wheel lorries to represent this part of Use 2.

72. I take the view that Use 3. has operated at a low intensity over the years. Grit blasting, for example, at the present time continues to use basic equipment and is centred in a makeshift, albeit quite large, building. The level of activity described for Use 3. in paragraph 70 above comes from Mr Elding's oral evidence. That appears to me to give a reasonable indication of the scale of the use. The evidence shows Use 4. to have a very static character, with the vehicles and other items stored often remaining untouched for long periods, a form of waste disposal. The use appears to me to have occupied wide areas of the site over the years with the disused items thinly spaced. I consider that the reference to 15 mixed items is a reasonable description of the scale of this use at the date of the application. The Council did not challenge Mr Elding's evidence about the days and hours of use of the buildings on the appeal site. I accept it too. Bearing in mind the general manner in which the site as a whole is used I conclude, on the balance of probability, that the days and hours of use of the rest of the site have been generally the same as those applying to the buildings. However I have also taken account of the observations of Mr Bromley about Sunday working.

73. In my view it would be open to the Secretary of State, should he wish to do so, to modify the description of the use the subject of the application, under Section 195(2) of the Act, to include also the wording set out in my paragraph 70 above.

74. Most of the evidence considered at the inquiry had been put to the Council before they determined the application. But some important new evidence was produced at the inquiry by the Appellant, including more details of the characteristics of the mixed use of the site over the relevant period. The Council questioned whether it is open to the Secretary of State to consider such new evidence. In my view the Secretary of State does have that discretion. The Council had the opportunity to identify, and test, the new evidence, and this they did. In my view it would not be proper for the Secretary of State to set aside relevant evidence made available to him through the appeal process. The statute requires him to decide whether a local planning authority's refusal of a Certificate was well founded. It does not require him to confine himself to examination of the local planning authority's reasons for that refusal, or to make his decision only on the basis of the evidence put to the Council at application stage.

75. Having regard to the limitations of the description of the claimed lawful use set out in the Appellant's application and to the limitations of the evidence put to the Council in the first instance I can appreciate why the Local Planning Authority decided to refuse the Certificate applied for. However in the light of all of the evidence now put to the inquiry I have concluded that the case for the granting of a Certificate has been made out. In my view a Certificate may be granted on the basis set out in paragraphs 62 and 70 above. In the circumstances I conclude that the Local Planning Authority's refusal to grant a Certificate of Lawfulness of Existing Use was not well founded.

RECOMMENDATION

76. I recommend that the appeal be allowed and that a Lawful Development Certificate be granted in the terms set out in paragraphs 62 and 70 of this report.

I have the honour to be
Sir
Your obedient Servant



INSPECTOR

APPEARANCES

FOR THE APPELLANT

Mr D P Bromley FRICS

- Faulkners, 49 High Street,
Kings Langley, Herts

He conducted the Appellant's case, gave evidence himself and also called:

Mr F Elding

- Representative of the
Appellant company

Mr R A Corby

- Kilbracken, Hudnall
Common, Little Gaddesden

FOR THE LOCAL PLANNING AUTHORITY

Mrs A Walker

- Senior Solicitor with the
Council

She called:

Mrs H Higenbottam
BA MRTPI

- A Senior Planning
Officer with the Council

DOCUMENTS

Document 1 - List of persons present at the inquiry

Document 2 - Notice of inquiry and circulation list

Document 3 - One law report put in for the Appellant

Document 4 - Proof of evidence and Appendices: Mr Bromley

Document 5 - Proof of evidence and Appendices: Mr Elding

Document 6 - Estimates of numbers of plant and machinery at various dates
put in for the Appellant

Document 7 - Two law reports put in for the Council

Document 8 - Proof of evidence and Appendices: Mrs Higenbottam

Document 9 - The Council's letter to the DoE 22 January 1997

Document 10 - Red summary account book 1977 - 89 put in by the Appellant

Document 11 - Bundles of invoices relating to plant hire 1983 - 85 put in
by the Appellant

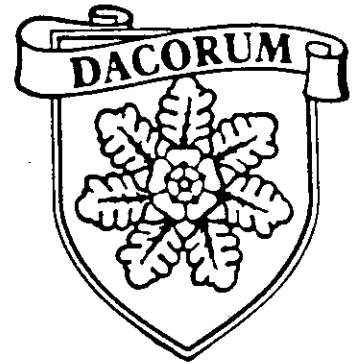
Document 12 - Four invoice books relating to contracting activities 1983 -
85 put in by the Appellant

PLAN

Plan A - Copy of application plan

PHOTOGRAPH

Photograph 1/1-3 - Three air photos of the appeal site, 1980, 1988 and 1990



TOWN AND COUNTRY PLANNING ACT 1990

DACORUM BOROUGH COUNCIL

Application Ref No. 4/1441/94

A Elding & Sons
Six Tunnels Farm
Gaddesden Row
Hemel Hempstead
Herts

Faulkners
49 High Street
Kings Langley
Herts
WD4 9HU

DEVELOPMENT ADDRESS AND DESCRIPTION
=====

Six Tunnels Farm, Gaddesden Row, Hemel Hempstead, Herts

APPLICATION FOR CERTIFICATE OF LAWFULNESS OF EXISTING USE - USE OF LAND AS
GENERAL CONTRACTORS YARD COMPRISING PLANT HIRE OF TIPPING AND BULK EXCAVATOR;
PLANT AND COMMERCIAL VEHICLE REPAIRS AND SPRAYING; GRIT BLASTING; STORAGE OF
PLANT VEHICLES AND EQUIPMENT AND DISUSED VEHICLES; PLANT AND EQUIPMENT USED FOR
ENGINEERING AND CONTRACTING.

Your application for *a lawful development certificate* dated 08.11.1994 and
received on 10.11.1994 has been **REFUSED**, for the reasons set out on the
attached sheet(s).

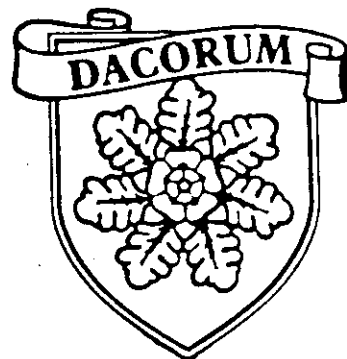
Director of Planning

Date of Decision: 15.08.1996

(ENC Reasons and Notes)

REASONS FOR REFUSAL
OF APPLICATION: 4/1441/94

Date of Decision: 15.08.1996



The information submitted is insufficient to demonstrate the intensity of the use of land as a General Contractors Yard comprising plant hire of tipping and bulk excavators; and the storage of plant vehicles and equipment and disused vehicles plant and equipment used for engineering and contracting since November 1984.

Mr D P Bromley
Faulkners
49 High Street
Kings Langley
Herts
WD4 9HU

PLANNING DEPARTMENT DACORUM BOROUGH COUNCIL						
Ref.		D.P.	D.C.	E.C.	App.	Per.
Received - 9 SEP 1998						
Comments						

DIRECT LINE: 0117 9878746
FAX: 0117 9878639
GTN CODE: 1374

OUR REF: APP/X/97/A1910/002690
YOUR REF: DPB/PM/4/15575

- 8 SEP 1998

4/144/94 LD

Dear Sir

**TOWN AND COUNTRY PLANNING ACT 1990 - SECTION 195
LAND AT SIX TUNNELS FARM, GADDESSEN ROW, HEMEL HEMPSTEAD
APPEAL BY A ELDING & SONS**

1. I am directed by the Secretary of State for the Environment, Transport and the Regions to refer to the report of the Inspector, Mr A J J Street MA(Oxon) DipTP MRTPI, who held a local inquiry into your clients' appeal against Dacorum Borough Council's refusal to grant a lawful development certificate (LDC) for the existing use of land at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead as a Contractor's yard - including plant hire of tipping and bulk excavators; plant and commercial vehicle repairs; grit blasting and the storage of plant equipment and vehicles. By letters of 8 August 1995 and 3 January 1996 the use in respect of which a Certificate was sought was amended to: General contractor's yard, comprising plant hire of tipping and bulk excavators; plant and commercial vehicle repairs and spraying carried out in the area hatched yellow on the plan; grit blasting carried out on the area hatched blue on the plan; and the storage of plant vehicles and equipment and disused vehicles, plant and equipment used for engineering and contracting on the areas edged red and hatched green on the plan.

2. The application for a LDC was dated 10 October 1994, and was made under section 191(1)(a) of the 1990 Act, as amended.

3. A copy of the Inspector's report of the inquiry is attached to this letter and contains, in paragraphs 3 to 8, a description of the appeal site and its surroundings. The Inspector's findings of fact are set out in paragraph 60 of the report and are all accepted. His conclusions, are set out in paragraphs 61 to 75 and his recommendation in paragraph 76 of the report. A copy of those paragraphs is annexed to this letter and form part of it. The report has been carefully considered.

REASONS FOR THE DECISION

4. The onus of proof is on the appellant to show that, on the balance of probability, the uses described in paragraph 1 above had continued, without material change, throughout the

10 year period before the date of the LDC application. In this case, the Council accepted that the use of the site for commercial purposes had continued for a period of over 10 years but argued that the appellant had failed to provide a precise description of the use of the site in accordance with the terms of Circular 17/92. In particular, the level of intensity of the use of the land had not been explicitly stated for the relevant 10 year period. The Secretary of State notes that new evidence was produced at the inquiry by the appellant, including more details of the characteristics of the mixed use of the appeal site over the relevant period and that the Council questioned whether it was open to the Secretary of State to consider such evidence. The Inspector's conclusions on this point, set out in paragraph 74 of his report, are accepted for the reasons he gives. The Secretary of State is required to examine all relevant evidence made available during the appeal process and, although the evidence in question was produced at a late stage, he is satisfied that the Council had sufficient opportunity to identify, and test, the new evidence.

5. Against this background, the Secretary of State has carefully considered the Inspector's assessment of the available evidence concerning the use of the site, in the light of the various judicial authorities referred to by the parties, and accepts his conclusions, for the reasons he gives. The Secretary of State therefore agrees that, as a matter of fact and degree, the appeal site formed a single planning unit, the use of which was a mixed use, comprising four primary elements as follows:-

- i) as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment;
- ii) for the stationing of contractors vehicles, plant and equipment;
- iii) for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying;
- iv) for the long term storage of disused vehicles, plant and equipment.

6. It is also agreed, for the reasons the Inspector gives, that the documentary and witness evidence presented at the inquiry is sufficient to show, on the balance of probability, that all four components of this mixed use have continued, throughout the ten years prior to the application and although it appears that there has been some fluctuation in the level of activities taking place since 1984, including some intensification of the overall use of the site, these changes have not been such as to involve a material change of use of the land. Your clients' appeal succeeds accordingly. A LDC is being granted in terms reflecting the mixed use of the site as set out in paragraph 5 above, as the Inspector suggests; and, in the light of the guidance in Annex 8 of Circular 10/97, a description of each of the components of the mixed use of the land within the appeal site at the date of the application is being included, to provide a point of reference against which any subsequent change may be assessed. The detailed descriptions suggested by the Inspector, in paragraph 70 of his report, have been accepted but it should be noted that the Secretary of State interprets the references to "hours and days of use" as meaning the working hours or times between which the activities comprising the mixed use now found to be lawful, have been carried on during the ten year period.

FORMAL DECISION

7. For the reasons given above, the Secretary of State hereby allows your clients' appeal and grants a lawful development certificate, enclosed with this letter, for the existing use of land and buildings at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead for a mixed use, comprising four primary uses as follows:-

- i) as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment;
- ii) for the stationing of contractors vehicles, plant and equipment;
- iii) for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying;
- iv) for the long term storage of disused vehicles, plant and equipment.

RIGHT OF APPEAL AGAINST THE DECISION

6. This letter is issued as the Secretary of State's determination of the appeal. Leaflet X, enclosed for those concerned, sets out the right of appeal to the High Court against the decision.

Yours faithfully



A J WRIGHT

Authorised by the Secretary of State
to sign in that behalf

ANNEX TO DECISION LETTER

APP/X/97/A1910/002690

CONCLUSIONS

61. The legal implications of the above facts are matters for the Secretary of State, but, bearing them in mind, my conclusions are as follows.

62. In the light of my inspections and my examination of the representations I conclude, as a matter of fact and degree, that at the date of the inquiry the appeal site, comprising the areas outlined in red and hatched green, yellow and blue on Plan A, formed a single planning unit, the use of which, in brief, was as follows: a mixed use; 1. as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment; 2. for the stationing of contractors vehicles, plant and equipment; 3. for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying; and 4. for the long term storage of disused vehicles, plant and equipment.

63. The main considerations which led me to reach that conclusion are as follows. There is no evidence that the activities taking place on the appeal site are also taking place elsewhere on the farm. The appeal site appears to be used for distinct purposes. I consider that the four components of the mixed use which I have identified are of such a character and scale as to each constitute primary uses of the land. The four uses are functionally separate but do not occupy distinct and separate parts of the site. Use 1. is operated by the Appellant firm. I do not regard the contracting activities and the plant hire activities as two separate primary uses because it is clear that: they are both operated by Elding & Sons; they involve largely the same stock of vehicles, plant and equipment; they use the site in essentially the same way. Use 2. is distinguished from Use 1. as the activities are not under the direct control of Elding & Sons, but of McDermott Construction Ltd and others, and as Use 2. does not include a plant hire element.

64. With regard to Use 3. I conclude that the greater part of the repair activity taking place at the appeal site involves the provision of repair services to customers not based at Six Tunnels Farm. I do not view the mechanical repairs and the grit blasting activities as separate primary uses as they are closely linked functionally and are both activities of a general industrial kind. Use 3. takes place mainly in the buildings in the south corner of the site, but I find that some repair activity, and parking ancillary to the use, takes place in the yard. Use 1. also involves repair activities. In all these circumstances I find Use 3. to be one component of the mixed use of the appeal site planning unit and not a sole primary use of a separate planning unit comprising the buildings hatched on Plan A. As to Use 4. it is clear that at the time of the inquiry substantial parts of the appeal site were used for the long term stationing of disused vehicles, plant and equipment. Although many of these items may have been actively used in the Appellant's enterprises in the past I consider that they no longer form part of Use 1., or indeed of Uses 2. and 3. Use 4. is essentially a form of waste disposal of discarded items, with a very low level of activity. The Appellant referred to the cannibalisation of these items but very little evidence was produced about that and I regard it as de minimis. The disused items also include a small proportion of farm equipment, not much related to the other activities in the yard.

65. I conclude also, on the balance of probability, that the mixed use of the appeal site at the date of the inquiry, which I have described briefly in paragraph 62 above, was also taking place at the date of the Appellants application to the Council, 10 October 1994, and at the dates of the subsequent amendments to the application, 8 August 1995 and 3 January 1996.

66. Comparing the definition of the use of the appeal site set out at paragraph 62 with the Appellant's description of the use in the original application and the amended application I take the view that the Appellant's descriptions do not define properly what was going on on the land at the relevant time. However I am in no doubt that the application and amended application were intended to label the self same use that I have identified. In the circumstances I consider that, should he wish to do so, it would be open to the Secretary of State, under Section 195(2) of the 1990 Act, to modify the description of the use set out in the Appellant's application to include the wording set out in my paragraph 62.

67. I now consider whether the use which I have described in outline in paragraph 62 was lawful at the date of the application. For it to be lawful the Appellant has to show that the use of the planning unit at the date of the application, or a use not materially different from it, began more than 10 years before the date of the application, that is, essentially, before 10 October 1984.

68. A substantial amount of evidence was produced for the Appellant firm, including relevant contemporary documentation, about the use of the site for the period before and around October 1984. From this evidence I am in no doubt that at that time the appeal site formed a separate planning unit in use for a mixed use comprising the four primary uses which I have identified as taking place at the date of the inquiry and of the application. It appears that there have been some changes to the activities taking place on the site since 1984, including some intensification of the overall use of the site, as evidenced by the sequence of air photographs, and changes to the stock of vehicles associated with Elding and Sons's groundwork contracting activities. However I conclude that all four components of the mixed use have continued

throughout the period and that the changes which have occurred have not been such as to involve a material change in the use of the land, whether by intensification or whatever. Accordingly I conclude that the use which I have described in outline in paragraph 62 is a lawful use.

69. Section 191(1)(c) of the 1990 Act requires an applicant for a Certificate to "describe" the use and Circular 10/97 indicates that a Certificate should state the characteristics of the use so as to define it unambiguously. In my view the definition of the use set out in the Appellant's application (paragraph 1.c. above) does not meet these requirements. It is far too unspecific. However in the light of the evidence put to the inquiry I consider that a satisfactory description of the use can be provided in this case. The purpose of "describing" the use in detail is to provide a point of reference against which any future intensification of the use can be compared.

70. On this basis and in the light of all of the evidence I conclude, on the balance of probability, that a full description of each of the components of the mixed use should include the following:

- (i) Use 1. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
- Groundwork contracting;
 - stationing of; one 15 tonne lorry, two large vans; one low loader tractor unit; four trailers; one Landrover; ; one JCB; three Caterpillar tractor units with shovels; one Drott machine; three small concrete mixers.
- Plant hire;
 - hire of all of the items listed under "groundwork contracting" with the exception of the two vans, the low loader tractor unit, the four trailers and the Landrover.
- (ii) Use 2. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
- Stationing of; three lorries; four vans; two JCBs; three small dumper trucks; two rollers; 5 compressors; one small concrete mixer.
- Stationing of two four wheel lorries.
- (iii) Use 3. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday 08.00 hrs to 13.00 hrs.
- Mechanical repairs and maintenance; not more than two vehicles or items of plant or equipment under repair or maintenance on any one day.

73. In my view it would be open to the Secretary of State, should he wish to do so, to modify the description of the use the subject of the application, under Section 195(2) of the Act, to include also the wording set out in my paragraph 70 above.

74. Most of the evidence considered at the inquiry had been put to the Council before they determined the application. But some important new evidence was produced at the inquiry by the Appellant, including more details of the characteristics of the mixed use of the site over the relevant period. The Council questioned whether it is open to the Secretary of State to consider such new evidence. In my view the Secretary of State does have that discretion. The Council had the opportunity to identify, and test, the new evidence, and this they did. In my view it would not be proper for the Secretary of State to set aside relevant evidence made available to him through the appeal process. The statute requires him to decide whether a local planning authority's refusal of a Certificate was well founded. It does not require him to confine himself to examination of the local planning authority's reasons for that refusal, or to make his decision only on the basis of the evidence put to the Council at application stage.

75. Having regard to the limitations of the description of the claimed lawful use set out in the Appellant's application and to the limitations of the evidence put to the Council in the first instance I can appreciate why the Local Planning Authority decided to refuse the Certificate applied for. However in the light of all of the evidence now put to the inquiry I have concluded that the case for the granting of a Certificate has been made out. In my view a Certificate may be granted on the basis set out in paragraphs 62 and 70 above. In the circumstances I conclude that the Local Planning Authority's refusal to grant a Certificate of Lawfulness of Existing Use was not well founded.

RECOMMENDATION

76. I recommend that the appeal be allowed and that a Lawful Development Certificate be granted in the terms set out in paragraphs 62 and 70 of this report.

I have the honour to be
Sir
Your obedient Servant



INSPECTOR

DEPARTMENT OF THE ENVIRONMENT TRANSPORT AND THE REGIONS


TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (GENERAL DEVELOPMENT PROCEDURE) ORDER
1995
ARTICLE 24

CERTIFICATE OF LAWFUL USE OR DEVELOPMENT

IT IS HEREBY CERTIFIED that on 10 October 1994 the uses described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched black on the plan attached to this certificate, were lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:-

the uses were immune from enforcement action because they had continued for a period of more than ten years before the date of the application for a certificate.

Signed 
A J WRIGHT
Authorised by the Secretary of State
to sign in that behalf

Date - 8 SEP 1998

Reference: APP/X/97/A1910/002690

First Schedule

A mixed use for:-

Use 1

Groundwork contracting - the repair, maintenance and stationing of; one 15 tonne lorry, two large vans; one low loader tractor unit; four trailers; one Land rover; one JCB; three Caterpillar tractor units with shovels; one Drott machine; three small concrete mixers. and

Plant hire - hire of all of the items listed under "groundwork contracting" with the exception of the two vans, the low loader tractor unit and the Land rover.

Carried on between the following times:-

Monday to Friday - 08.00 to 1900 hours
Saturday - 08.00 to 1300 hours
Sunday - nil

Use 2

The stationing of contractors vehicles, plant and equipment comprising; three lorries; four vans; two JCBs; three small dumper trucks; two rollers; 5 compressors; one small concrete mixer; and stationing of two four wheel lorries,

With the use of the vehicles etc carried on between the following times:-

Monday to Friday - 08.00 to 1900 hours
Saturday - 08.00 to 1300 hours
Sunday - nil

Use 3

Mechanical repairs and maintenance of commercial vehicles, plant and equipment (involving not more than two vehicles or items of plant or equipment under repair or maintenance on any one day); and
grit blasting and spraying, (involving not more than one vehicle or item of plant or equipment being sand blasted and/or sprayed on any one day).

Carried on between the following times:-

Monday to Friday - 08.00 to 1900 hours

Saturday - 08.00 to 1300 hours

Sunday - 08.00 to 1300 hours

Use 4

Long term storage of 15 disused items (a mixture of lorries; vans; JCB or Caterpillar tractor units with shovels; dumper trucks; compressors; concrete mixers).

Daily working hours associated with this use;

Monday to Friday - 08.00 to 1900 hours

Saturday - 08.00 to 1300 hours

Sunday - nil

Second Schedule

Land at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead.

IMPORTANT NOTES

NOTES

1. This certificate is issued solely for the purpose of section 191 of the Town and Country Planning Act 1990 (as amended).
2. It certifies that the use and operations described in the First Schedule taking place on the land specified in the Second Schedule were lawful, on the certified date and, thus, were not liable to enforcement action, under section 172 of the 1990 Act, on that date.
3. This certificate applies only to the extent of the use and operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use or operation which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

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DEPARTMENT OF THE ENVIRONMENT
TRANSPORT AND THE REGIONS

This is the plan referred to in the
Secretary of State's decision letter
dated 8 SEP 1998

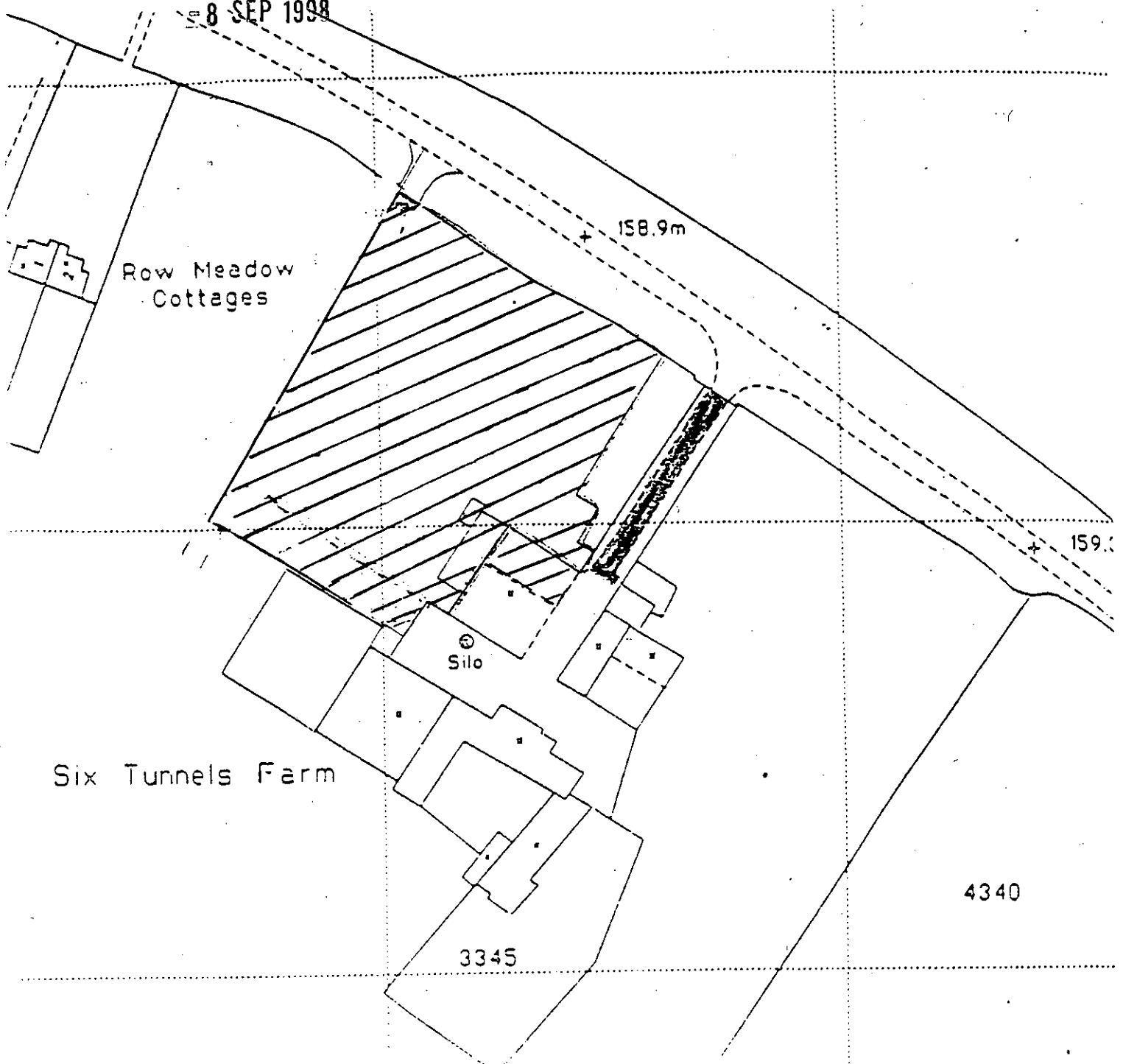
Reference APP/X/97/A1910/002690

A J Wright

A J WRIGHT

Authorised by the Secretary of State
to sign in that behalf

8 SEP 1998



TOWN AND COUNTRY PLANNING ACT 1990
PLANNING AND COMPENSATION ACT 1991
DACORUM BOROUGH COUNCIL

APPEAL

by

A ELDING & SONS

concerning an application for a
CERTIFICATE OF LAWFULNESS OF EXISTING USE OR DEVELOPMENT
in respect of land at
SIX TUNNELS FARM, GADDESSEN ROW, HEMEL HEMPSTEAD

Inspector: A J J Street MA(Oxon) DipTP MRTPI
Dates of Inquiry: 28 and 29 October 1997
File Reference: APP/X/97/A1910/002690

Tollgate House
Houlton Street
BRISTOL
Bs2 9DJ

22 APR 1998

To the Right Honourable John Prescott MP
Secretary of State for the Environment, Transport and the Regions

Sir

I have the honour to report that on 28 and 29 October 1997 I held an inquiry at the Council Offices, Hemel Hempstead, into an appeal by A Elding & Sons under Section 195(1)(a) of the Town and Country Planning Act 1990, as amended by the Planning and Compensation Act 1991, against the decision by the Dacorum Borough Council to refuse an application for a Certificate of Lawful Use or Development. The site is at Six Tunnels Farm, Gaddesden Row, Hemel Hempstead.

1. a. The application is dated 10 October 1994.
b. The application is made for a Certificate of Lawfulness of Existing Use or Development under Section 191(1)(a) of the amended Act.
c. The existing use in respect of which a Certificate was sought in the original application was:

Contractor's yard - including plant hire of tipping and bulk excavators; plant and commercial vehicle repairs; grit blasting and the storage of plant equipment and vehicles.

By letters dated 8 August 1995 and 3 January 1996 the use in respect of which a Certificate was sought was amended to:

General contractor's yard comprising plant hire of tipping and bulk excavators; plant and commercial vehicle repairs and spraying carried out in the area hatched yellow on the plan; grit blasting carried out on the area hatched blue on the plan; and the storage of plant vehicles and equipment and disused vehicles, plant and equipment used for engineering and contracting on the areas edged red and hatched green on the plan.

- d. The use of the land at the date of the application was stated to be as set out at c. above.

- e. The grounds for refusal of the application were: the information submitted is insufficient to demonstrate the intensity of the use of land as a general contractor's yard comprising plant hire of tipping and bulk excavators; and the storage of plant vehicles and equipment and disused vehicles plant and equipment used for engineering and contracting since November 1984.

2. This report includes a description of the site and its surroundings, the gist of the representations made at the inquiry, my findings of fact, conclusions and recommendation. Lists of appearances, documents plans and photographs are attached. The evidence was taken on oath.

SITE AND SURROUNDINGS

3. I inspected the site on the late afternoon of 28 October 1997 and on the afternoon of 29 October 1997.

4. The site lies in generally open countryside to the east of the small settlement of Jockey End. It is situated on the south west side of the road Gaddesden Row and its north east boundary adjoins the road. To the rear of the site are the agricultural buildings of Six Tunnels Farm and the farm house. I did not inspect these buildings.

5. The appeal land is shown on Plan A. It is roughly square in shape and about 0.5 hectare (1.3 acres) in size. The road frontage has a substantial hedge along it but the other boundaries are not demarcated physically on the ground. The access to the land is in the north corner. Most of the site comprises open ground. However in the south corner it extends into the first two bays of the 6 bay concrete framed barn building there, hatched yellow on Plan A, and it also includes a primitive open fronted lean-to pole barn shown hatched blue on Plan A. Adjoining the pole barn is a van body used as a paint store and a small compound containing compressors.

6. The site has an uneven surface. Sizeable parts, particularly focusing on the tract between the entrance from the road and the barns in the south corner, have a stoned surface. But other areas, towards the north and north east boundaries of the site and to the north of the area hatched green on Plan A, and extending in total to very roughly half of the surface area, appear to have an earth surface and were substantially overgrown with grass and other vegetation at the time of my visits.

7. At the time of my visits a substantial number of vehicles and pieces of plant and equipment were stationed on the land. Many of the vehicles and other items were in working order and use, but a number appeared to be disused. Some of the disused items appeared not to have been touched for years and were overgrown and scarcely visible. The items in working order were mostly stationed on or around the edges of the areas of stoned surface. The disused items tended to be sited in haphazard fashion on the grassed and overgrown areas. Of the working items there were: three 6 wheel lorries; three ex-army lorries; 5 diggers/excavators of the "JCB" type; one tipper lorry; three small dumper trucks; three small concrete mixers; a caravan/site office; two fork lift trucks; one farm tractor; a new agricultural plough; one small portable crane; four compressors; three skips; two pick-up vans and one "Transit" size van. Two of the road vehicles were sign-written with the Appellant's name; two lorries bore the name McDermott Construction Ltd. The apparently disused items included: a large van body; a large mobile crane dating from 1949; a trackless excavator; four tractors, mostly farm type; a tractor cab; a muck spreader; an abandoned car and van; a trailer; two ploughs; several excavator buckets; a pile of old tyres.

8. The pole barn contained simple grit-blasting equipment. The two bays of the concrete frame barn contained a compressor which was being repaired.

UNDISPUTED FACTS

9. The Council agreed, in January 1997, that the use of the site for commercial purposes had endured for a period of over 10 years (Document 9).

10. The Council informed the Appellant at the same time that in the case of the use of the building hatched yellow for commercial vehicle and plant repairs and the use of the building hatched blue for commercial sandblasting a good case had been made out for the grant of a Certificate of lawful use, subject to hours of use limitations (Document 9).

INITIAL SUBMISSIONS

11. At the start of the inquiry I requested the Appellant's side to explain to me what the claimed lawful use of the land represented in terms of planning unit(s) and primary and ancillary uses. I asked the Council to comment also.

The material points were:

Mr Bromley for the Appellant

12. The area edged red and hatched green on Plan A served the groundwork contracting business of Elding & Sons. The contracting vehicles and plant were also hired out. There was ancillary parking of vehicles. Disused vehicles, plant and equipment was stored too, to be "cannibalised" for parts for working items. This was a composite use. The yard was also used by other firms, in particular by McDermott Construction Ltd, for the parking and storage of vehicles and plant. McDermott's vehicles were also repaired by Elding & Sons. The barn hatched yellow was used by Eldings for the repair of their own vehicles and plant and for the repair of commercial vehicles and plant owned by others. The repair and maintenance work also extended into the open yard. There was no segregation of activities and uses within the yard. Vehicles and plant were just stationed on the best spot available at any one time. It was appreciated that it was necessary to establish a "point of reference" or "benchmark" for the level of use of the site, against which future changes could be judged, and that the level might well be the one that had existed 10 years before the date of the application for the Certificate.

Mrs Walker for the Council

13. It was accepted that there was a contracting business operating from the site and that the plant concerned was hired out when not required by Elding & Sons. But the Council were not sure about what parts of the land were used for those purposes or about the intensity of the use. These were vital points as this was a large site and much of it was not intensively used at present. The Council were also aware of the repairs use. But they were not clear as to the extent to which it was a primary use or an ancillary use, or about hours of usage. They had only just heard the claim that items were repaired in the open yard and they had no evidence on that. They disputed that the storage use by other contractors had been going on for more than 10 years and they were not clear as to the intensity of that use. They were very uncertain about the significance of the fact that much of the site was occupied by disused vehicles; they were uncertain about the extent of the areas so used and about the nature of the use. To assess exactly what use might be lawful it was necessary to establish what levels of what activities had been undertaken on a year by year basis over the relevant period. The Appellant had not provided that information. The Secretary of State had a narrow role; to decide whether the Councils' decision had been well founded. It was not for him to go into new evidence.

OPENING SUBMISSIONS FOR THE APPELLANT

The material points were:

Mr Bromley

14. The Council had accepted that commercial use had taken place and that it had included repairs and sand blasting activities. They had helpfully narrowed down the issues in other ways also. For example the extent of the yard was accepted, as was the fact that vehicles, plant and equipment had been stored there. The only issue was the level of use of the yard. The use did not fall into a Use Class; it had been untidy; and ad hoc. But that did not prevent a Certificate being issued. The Secretary of State did not have to establish absolute facts. He had to work on the balance of probability. On that basis the Appellant's case had been proved. The extent, nature and general level of activity had been shown.

THE EVIDENCE FOR THE APPELLANT

The material points were:

Mr Corby - Evidence in Chief

15. He submitted his Statutory Declaration (Document 4/App 3). He had known the area for a very long time and had been past the site at least six times a year since 1967. He had seen a substantial number of commercial vehicles, plant and earth moving equipment on the site and had seen vehicle repair work being undertaken there throughout that time. He knew that the Elding family had run their general commercial vehicle and machinery contracting and maintenance business from the site since 1957.

Mr Corby - Cross-examined by Mrs Walker

16. He had passed by the site at many different times of the day. There had always been a mixture of agricultural vehicles and contracting vehicles there. Very roughly the split had been 50/50. He had been on the site itself - perhaps 12 times since 1984. The land had always had the appearance it had at the time of the inquiry.

Mr Corby - Questioned by me

17. He had no detailed knowledge of the activities of Elding and Sons, for example as to the numbers of vehicles stationed on the land at various times. He judged that the business had come into existence in the first place because there had been 6 brothers on a farm of only 200 acres and thus a need for additional work.

Mr Bromley - Evidence in Chief

18. He submitted his proof of evidence and Appendices (Document 4). Whilst most activity related to repairs and spraying was carried out within the buildings referred to some work was done in the open, for example the spraying of water bowsters, as photographs showed (Document 5/APP 5). Documentary evidence put in by the witness in support of the Appellant's case comprised: a Declaration by Mr T McDermott relating to his company's use of the site; the Statutory Declaration of Mr Corby; letters from three former employees of Elding & Sons and from Stathams Garage relating to the past use of the site; a letter from the Council of 1982 confirming

commercial activity at the farm; a letter of 1994 from the Council confirming an officer's personal knowledge that the storage and maintenance of motor vehicles and the sand blasting of motor vehicles had been carried on since before 1984; and air photographs of 1980 and 1988.

19. The air photographs (Photograph 1) had obvious limitations, not least that they had been taken at times of the day when many items would not have been on site. They could not be relied upon as primary evidence. But they gave an indication of levels of use. The 1980 picture showed about 28 items within the area edged red on Plan A and a further 20 on the land to the west. The 1988 picture showed about 39 items within the areas edged red and hatched green and a further 7 on the land to the west.

Mr Bromley, Cross-examined by Mrs Walker

20. The application related to the land only and not to the buildings upon it as such. He did not know how long the "rotting hulks" of disused vehicles and plant had been on the site. A substantial part of the yard surface was not being actively used for business purposes now and had not been in the past. There were a number of agricultural vehicles and items of agricultural equipment on the site which had not been used for a long time. Some agricultural items were used in the contracting business.

21. The evidence about outside repairs had been put to the Council before the inquiry; but the 1988 air photograph had not. The Government Circulars relating to Certificates did require uses to be defined in detail. But the sui generis use involved in this case was very varied and complicated and difficult to be precise about. It was not possible to distinguish agricultural vehicles and equipment used on the farm from contracting vehicles and equipment on the air photographs submitted. Comparison of the three air photographs for 1980, 1988 and 1990 (the 1990 photograph is at Photograph 1) did show that the vehicle storage/parking area at the farm had contracted over the years, into the area of the appeal site.

22. The hours of working of the commercial vehicle repair use were the same as those of the sand blasting use: Monday to Friday 08.00 hrs - 19.00 hrs; Saturdays and Sundays 08.00 hrs - 13.00 hrs. The Appellant had not been able to supply precise evidence on numbers of vehicles and plant stationed on the land on a yearly basis - the numbers had varied all the time and records had not been kept. Moreover vehicles had been bought in over the years just to be cannibalised for spares and there were no records of these or of old disused vehicles kept on the land in the past. However Mr Elding had confirmed that the contracting business had operated 9 vehicles over the relevant period 1984 - 94 and he had given details of those. The Appellant had never been asked to supply details of employment numbers before. The 1984 and 1985 invoices supplied to the inquiry relating to repair work and plant hire were just a random sample and were not the total possessed by the Appellant. No analysis of the available invoices had been done in support of the application for a Certificate - one problem was the lack of records, especially about disused vehicles. They had not been asked to provide more detailed information about the scale and intensity of the plant hire use. The plant hire business had involved the hiring out of Elding's contracting vehicles and plant when they were not being used by the Appellant.

23. The Council had indeed sent several requests to the Appellant for more information about the uses. More information had been provided, as much as they could. McDermott Construction Ltd had provided a list of

vehicles and plant which they said had been stored on the land (Document 4/APP 2/TM 2). Where that list referred to items stored from a particular date "onwards" that word meant up to January 1996. Some of the items referred to had not been on the site for the whole of the period 1984 - 94. The list was not complete either, in that McDermott's had also parked operational vehicles on the site overnight, and still did. To his knowledge they currently parked three lorries on the land. The letters from former employees (Document 4/App4-6) did not go into any detail about the past use of the site.

Mr F E Elding - Evidence in Chief

24. He submitted his proof of evidence and Appendices (Document 5). He had lived at Six Tunnels Farm since 1927. Elding & Sons had operated a contractors business from the farm since before 1963. This had been their only operating centre. The business comprised: plant hire, bulk excavation, tipping, plant and commercial vehicle repairs, grit blasting and storage of plant and equipment and vehicles. They had built up a large number of clients in the building and civil engineering construction field. The yard had originally extended to the area edged red on Plan A. In 1982 it had been extended to include the area hatched green on that plan. The storage and parking of items in the yard was on a random basis.

25. In 1984 Elding & Sons had the following working vehicles based at the site: one 15 tonne rigid lorry; two large vans; one low loader tractor unit; four trailers for moving plant; one Landrover. At that time their working plant and equipment had comprised: one JCB; three Caterpillar tractor units with shovels; one Drott machine (a machine similar to the JCB and Caterpillar units); cement mixers. They had continued with the same kind of business and had kept a similar quantity of vehicles, plant and equipment ever since then. Document 12 was four invoice books covering the period 1983 - 85 and illustrating general contracting work carried out by Elding & Sons over that period.

26. All of Elding's working plant and equipment, together with the 15 tonne lorry, had been available for hire in 1984. Document 11 was a bundle of plant hire invoices covering the period 1983 - 85. The Appellant had run the plant hire enterprise on the same sort of scale ever since then.

27. Mr T McDermott's Declaration (Document 4/APP 2) confirmed that his firm had parked and stored vehicles, plant and equipment on the appeal site since 1974. They were civil engineering contractors. That firm had its offices and a small yard at Dunstable but those premises were too small to hold all of their equipment. Currently they parked three or four lorries and two or three small vans on the land overnight and they stored plant there too. That firm had also stored building materials, but only intermittently. Many other contractors had also stored plant and equipment on the site over the years. Adder Plant had used the site for four or 5 years to store a number of small items. The other contractors listed had used the land for just a few months. Photographs taken in the 1980s and 1990s showed a typical usage of the site (Document 5/APP 5). The photographs did not show much agricultural equipment. But farm tractors were used occasionally for contracting work. The farm was mostly pasture and so the range of farm equipment was limited - one or two tractors and trailers, a grass cutter and bailer and a fork lift truck.

28. An account book (Document 10) summarised commercial vehicle and plant repair work undertaken over the period 1977 - 89 in the two bays of the

barn shown hatched yellow on Plan A and in the adjoining pole barn. About one or two vehicles or items were under repair or servicing on an average day. The intensity of the use had not changed much over the years from before 1984. About one vehicle or other item was undergoing sand blasting and spraying treatment on an average day. It took two or three days to complete the job of sand blasting and spraying an item. The land outside the buildings was used periodically for repair work, for example if the weather was nice, and items awaiting repair/collection were stationed on that land also.

29. He agreed with Mr Bromley's evidence (paragraph 19 above) about the number of items of plant and equipment shown on the site and on adjoining land nearby on the 1980 and 1988 air pictures. When allowance was made for vehicles not likely to have been on site when those pictures had been taken the figures represented a reasonable measure of the intensity of the use of the site over the years. There had been fluctuations over the years in the levels of activity of different parts of the business, but no major changes. The overall level of activity at the present time was perhaps about 20 per cent above the level of say 1984.

Mr Elding, Cross-examined by Mrs Walker

30. The mechanical repairs and the sand blasting activities worked the same hours. Although his evidence qualified the 1984 list of working vehicles with the word "included" the list shown had in fact been the total number of vehicles in use at that date. The firm no longer had a commercial vehicle operator's licence. The nature of the business had not changed. It was just that they no longer had their own low loader tractor unit. When they wished to move plant they hired a lorry. They still ran a plant hire operation. He considered that a bundle of invoices did provide proof that vehicles were hired from the appeal site. He had not kept lists of the plant and vehicles owned by the company - he had worked out the 1984 list, produced in evidence, from the invoices. He could have done that for 1994 if he had been asked.

31. The company still had a Drott machine. Some of the vehicles and items of plant on the site were both stored there and available for cannibalisation. He could not say what proportion of the items on site which were stored and unused were beyond re-use. Some of the items buried in vegetation might still be capable of re-use. None were of historic value. None of the items were "junk". About 10 per cent of the items constituted agricultural equipment. Very little of the equipment was used both for farming and for the contracting business.

32. Currently one vehicle or other item was on the premises for sand blasting on an average day. About one or two vehicles or items of plant were under repair each day - there was always something in being repaired. Some of the work was on Elding's own vehicles and equipment, but most was for outside contractors.

33. He could not say what percentage increase there had been in activity on the site since 1984, but it had not been very great. He could not tell from the air photographs what items were what. Other contractors still used the site for storage, if there was space. Certainly more plant could be stored on the land, if the disused items were removed.

Mr Elding, Re-examined by Mr Bromley

34. An operators licence was not needed for a 15 tonne lorry or for large vans. The company still owned: a JCB; three Caterpillar units with shovels; a Drott machine; two large vans; two trailers and a Landrover. Old disused plant was removed from the site occasionally.

Mr Elding, Questioned by me

35. The administration of the business was done from the farmhouse. The working farm vehicles and machines were kept in another yard. The 15 tonne lorry was used for earth moving. The four trailers owned in 1984 were for use with the low-loader tractor unit, to move plant. Employment was 8 at present - 5 brothers and three employees. It had been up to 10 in the past. The limited amount of farm work was shared out between the brothers. There had been little change over the years in the various components of the use of the yard.

THE EVIDENCE FOR THE LOCAL PLANNING AUTHORITY

The material points were:

Mrs H M Higenbottam, Evidence in Chief

36. She submitted her proof of evidence and Appendices (Document 8). Circular 17/92 made clear that the onus of proof was on the Appellant: the LPA need not go to great lengths to show that the use claimed was not lawful. In this case the Council had made available what information they had and had made numerous suggestions as to what information the Appellant should supply to strengthen its case. This had not all been submitted. The Council had also been mindful of the Circular advice requiring claimed uses to be described precisely and for the limits of the use at a particular date to be set out. Bearing in mind R v Sheffield City Council (July 1994 TLR) the Council were also concerned that a certificate should not be granted in terms which were too wide.

37. In this case the level of intensity of the use of the land had never been explicitly stated for the relevant period November 1984 - November 1994. Vehicles, plant and uses had not been tied to the site at relevant dates. The numbers of disused vehicles, plant and equipment stored over the relevant period had never been stated. It had been agreed that there had been commercial use of the land over the 10 years. A good case had been made out for the granting of a certificate for the use of the land hatched yellow and blue for repairs and sand blasting respectively, subject to hours of use. But sufficient evidence had not been supplied about the intensity of the claimed use for plant hire of tipping and excavating vehicles. The air photographs of 1972, 1980, 1988 and 1990 (Document 8/Appendix D and Photograph 1) showed that over the years there had been a change in the number of items stationed on the site and in the intensity of the use of the site. The area of stoned hardstanding had also increased. The Council's refusal of a Certificate was well founded and a Certificate should not be granted.

Mrs Higenbottam, Cross-examined by Mr Bromley

38. The Parish Council had been notified of the application for a Certificate and had not commented on the matter. Not a great deal of new

evidence had been provided by the Appellant at the inquiry. Some points had been expanded and clarified - for example the fact that the Appellant no longer possessed a low loader tractor unit. But had the new information now provided been put to the Council earlier it would not have changed their decision - the use still had not been described fully. The witness had more questions about the use now than she had been aware of before the inquiry. For example the new information about items being stored on the land for cannibalisation appeared to introduce a new use, with elements of a scrapyards about it.

39. It was not accepted that the repair activities had ancillary parking and storage outside the buildings - if it was a question of one or two vehicles or items a day being dealt with that would not create any sizeable ancillary parking. Although the air photographs did show items stationed on the land they did not really prove much as to the precise nature or purposes of the stationing. Comparison of the 1980 and 1990 photographs did suggest that the area of "storage" use at the farm had contracted into the appeal site. Much equipment would have been off site at the times when the photographs had been taken.

40. The Appellant had provided information for 1984 but little for subsequent dates. The McDermott list showed that some of their equipment stationed on the land in 1984 had been sold before 1994. Mr Elding had indeed given oral evidence about changes since 1984 but he had concentrated on numbers of vehicles and plant and had said very little about how the actual uses and activities had changed. This was not just a contractor's yard. There was "storage" too but what that involved was far from clear. The Council accepted all of the evidence which had been produced and did not dispute the yard boundaries. But the intensity of the uses had not been defined and in a big yard that was very unsatisfactory - if the low key "storage" items were removed many more working vehicles and items of plant could be stationed there.

41. The Council could not have issued a Certificate for the sand blasting, spraying and repair activities alone. The whole site went together, evidently with ancillary use of the yard in association with the repairs and sand blasting activities, for example.

Mrs Higenbottam, Re-examined by Mrs Walker

42. In making their decision the Council had been guided by Circular 17/92. The new Circular 10/97 was to the same effect. It was only in respect of the sand blasting activity that the Council had possessed full information, for example on hours of use, when they had determined the application. Hours of use for the repair activities had not been provided until the inquiry. The Council could not reasonably have issued a Certificate relating to only about 5 percent of the activities on the appeal site.

Mrs Higenbottam, Questioned by me

43. The contractor's use appeared to be short term "storage", or parking. She had understood that the "storage" of disused plant had been a long term matter. But now it was said that some of the disused items were cannibalised and that seemed to be more than "storage". The presence of the big old 1949 crane appeared to be another sort of storage - almost of waste disposal. The Appellant's description of the use was not sufficiently specific. It was not clear, for example, what a "general

contractors yard" was. She was uncertain as to what sorts of contracts and what sorts of business were involved.

CLOSING SUBMISSIONS FOR THE LOCAL PLANNING AUTHORITY

The material points were:

44. For the application to be successful the Appellant had to show that the claimed use had begun more than 10 years before the date of the application, that was before October 1984. The burden of proof was firmly on the Appellant. Despite the Council's protracted efforts to assist the firm had failed to discharge that burden. Most of the evidence presented had related to 1984, not to the following 10 years.

45. The Council could not have issued a modified, more limited, Certificate under Section 191(4) of the Act. The only bit of the site for which they were satisfied that adequate evidence had been provided was the sand blasting building. It would not have been sensible to give a Certificate for one small element of a complex mixed use. Moreover, had they issued such a Certificate they would have been out of line with Circular advice - such a radical reduction of the scope of the application would not have been a "slight" alteration in the terms of Annex 8.35 to Circular 10/97. In any event the sand blasting activity might not be a primary use of the land, but only an ancillary.

46. The Appellant had failed to provide a "precise" description of the use as required by Circular 17/92 paragraph 22. To permit the use claimed in the form applied for would be to write a "blank cheque". The use was more complex than the Appellant seemed to realise. The purpose of the "storage" of items was important. "Storage" in terms of the overnight parking of vehicles was not the same as the long term stationing of a disused vehicle to provide spare parts. There were at least three kinds of "storage" on the site. There was the stationing of long disused items on the land - perhaps not a use at all. There was the stationing of items on a long term basis to be used for spares. This was perhaps an ancillary to the repair activities on the site, but no specific evidence had been given about it so it was hard to say. Thirdly there was the short term - generally - parking of vehicles and plant actively used in the business.

47. The Council accepted that commercial activities had been going on, but the intensity of the uses had not been defined for the relevant period. The site might have been run on an ad hoc basis and the firm's records might be poor. But that did not allow the Council to grant a Certificate on the basis of assumptions. The invoices put in did not themselves prove that a business had been run from the appeal site. The Appellant had failed to do any analysis of the invoices to clarify the intensity of the use. The site had been used for the stationing of farm vehicles and this had not been distinguished. There was much potential to use the land more intensively for its present purposes. The Council had to be careful also not to grant a Certificate for a use wider in scope than had actually existed. Hours of business for the vehicle and plant repair use had only been produced at the inquiry. Mr Bromley's final statements about the hours of business of the yard amounted to unsubstantiated new evidence given in final submissions.

48. The Inspector had suggested that one alternative way in which the use of the site at the date of the application might possibly be described, in planning terms, was as follows: a mixed use; 1. as a base for a groundwork

contractor's business, comprising the parking and storage of vehicles, plant and equipment and the maintenance of that equipment; 2. as a base for a plant hire enterprise; 3. for the parking and storage of contractors' vehicles, plant and equipment; 4. for the repair of commercial vehicles and plant, and grit blasting and spraying; 5. for the long term stationing/disposal of vehicles, plant and equipment. The Council were not able to comment on these suggestions. Certainly there were such activities. But without more evidence they could not say whether the uses referred to were primary uses or how those activities had changed over the years.

49. Certainly some more specific evidence had been produced at the inquiry. But it was still not sufficient. Moreover it was not open to the Secretary of State to consider new evidence.

50. The Appellant had attempted to define the overall intensity of the commercial use of the site over the years by reference to the number of vehicles and other items of plant and equipment which could be seen on the air photographs. This analysis was not accepted. It was impossible to tell from the pictures what many of the items were or how long they had been in place. The purposes for which they were stationed were also not evident. Some of the items could have been old and disused farm equipment. There were some of these on site now, and old cars. The figures advanced for 1990 in Mr Bromley's final submissions were new and untested evidence (Document 6). Furthermore the 1990 figures showed a 30 percent increase over the 1988 figure - arguably an indication that a material change of use had taken place. Moreover the suggested yardstick figure of 75 vehicles/machines/items of plant/items of equipment was too high. If one of the totals figures was to be used - and none was accepted - it should be the lowest, 62. The appeal should fail.

CLOSING SUBMISSIONS FOR THE APPELLANT

The material points were:

51. The use of the appeal site was one falling within the second category defined in the case of *Burdle v SSE* (Document 3) - a site used for a number of activities; a composite use where it was not possible to say that one use was ancillary to another. Even the repair and sand blasting activities were not closely confined to the buildings referred to, but spilled out into the yard where there was also parking ancillary to those activities.

52. The Council had accepted much of the Appellant's case. They had accepted that the planning unit to be considered was the yard area. They had accepted that the yard had enjoyed a commercial use for a great many years. They had accepted that the repair and sand blasting activities were lawful. Mr Elding had provided more information on times of use and on intensity. The Council had not disagreed with any of the evidence as such. The Parish Council had not disputed the claim of lawful use.

53. All that was left was the vexed question of the intensity of the use. This was difficult to define. Vehicles and other items had always been parked or stored randomly. No lists had ever been kept. The fact that some items were being stationed on the land awaiting repair while others were being stored on a long term basis was not very significant. The use was parking - generally short term - or storage - generally longer term - and "why?" was irrelevant. Whether plant was stored to be used later or

stored to be cannibalised later was not significant - it was still a use for the storage of plant.

54. To sort out the question of the intensity of the use the Inspector would have to adopt a robust approach. If a "benchmark" was required the total number of items of plant and equipment and the number of vehicles on the site should be looked at. Notwithstanding the Councils' views the series of air photographs provided the basis for such a benchmark. They showed a consistent picture, albeit they were all taken in the middle of the day when many of the contracting vehicles and other items of equipment would have been elsewhere. Allowing in the early years for items stored outside the appeal site the total number of items was about 62/63 in 1980 and in 1988 and about 82/83 in 1990 (Document 6). An appropriate 10 year average or benchmark would be 75 items.

55. If the Inspector decided against a robust approach the evidence submitted allowed other estimates of the intensity of the use to be assembled. Parking of vehicles and other equipment ancillary to the repair and sand blasting activities had involved one or two vehicles at any one time. The Elding and Sons contracting equipment had comprised: a JCB; Three Caterpillar units; one Drott machine; four trailers; concrete mixers; a 15 tonne lorry; two large vans and a Landrover. Until recently there had been a low loader tractor unit too. The McDermott storage had comprised the first 9 items on their list (Document 4/APP 2/TM 2); plus the overnight parking of three to four lorries and two vans. An allowance should also be made for items stored on the site for cannibalisation. Cannibalisation was not a new matter - the McDermott list referred to "vehicles and plant for spares". Some allowance should be made too for other items stored on site of which the Appellant could not provide a full list - such as the 1949 mobile crane. Agricultural equipment had only formed a small part of the vehicles and plant stored. Days and hours of use of the yard were the same as those described for the use of the buildings. However Sunday use of the yard might well just be in connection with the repair activities.

56. The description of the claimed use in the Appellant's application was soundly based. Elding & Sons were groundwork contractors; McDermott's were civil engineering contractors. So that was the basis for the description "general contractors yard". More specifically that meant: storage of plant and equipment; plant hire; repairs and sandblasting. The Appellant had tried to make the description as specific as possible.

57. If the terms of the application needed to be changed there were ample powers to make changes. Section 191(4) of the Act required Councils to modify applications if it was necessary. The use of the word "shall" in the statute implied compulsion. Regardless of what the Circular said there was nothing in the Act to suggest that only minor changes could be made. The Secretary of State had the same powers as the Council. If he found that the Council's decision had not been well founded then he could issue a Certificate which need not be in the terms applied for. If the Inspector decided against recommending the granting of a Certificate for all of the elements of the mixed use then he could certainly recommend a more limited Certificate, just covering the repair, sand blasting and spraying uses. If he could not define a suitable area of land to which that more limited Certificate should relate, an area extending outside the repair buildings themselves, then he was asked to recommend a Certificate covering the buildings only. The extent of any ancillary land outside the buildings could be a matter for further evidence at a later date.

58. The Appellant agreed generally with the Inspector's suggestions as alternative ways in which the claimed use might be described (paragraph 48 above). The levels of activity for the contracting use and the plant hire use by Elding & Sons plainly made those primary uses of the land. McDermott's were also a separate primary use within the mixed use. It was fair to put all of the repair activities together as a single primary use - they were all related. They accepted that the part use of the site as a "graveyard" for old equipment involved very long term stationing of equipment on the site.

59. The appeal should be allowed.

FINDINGS OF FACT

60. I find the following facts:

i. facts as to the site and its surroundings are set out in paragraphs 3 - 8 of this report;

ii. undisputed facts as to the Council's stance about some aspects of the history of the use are set out at paragraphs 9 - 10 of this report.

CONCLUSIONS

61. The legal implications of the above facts are matters for the Secretary of State, but, bearing them in mind, my conclusions are as follows.

62. In the light of my inspections and my examination of the representations I conclude, as a matter of fact and degree, that at the date of the inquiry the appeal site, comprising the areas outlined in red and hatched green, yellow and blue on Plan A, formed a single planning unit, the use of which, in brief, was as follows: a mixed use; 1. as a base for a groundwork contractor's enterprise and a plant hire enterprise, comprising the stationing of vehicles, plant and equipment and the repair and maintenance of that equipment; 2. for the stationing of contractors vehicles, plant and equipment; 3. for the repair and maintenance of commercial vehicles, plant and equipment, comprising mechanical repairs, grit blasting and spraying; and 4. for the long term storage of disused vehicles, plant and equipment.

63. The main considerations which led me to reach that conclusion are as follows. There is no evidence that the activities taking place on the appeal site are also taking place elsewhere on the farm. The appeal site appears to be used for distinct purposes. I consider that the four components of the mixed use which I have identified are of such a character and scale as to each constitute primary uses of the land. The four uses are functionally separate but do not occupy distinct and separate parts of the site. Use 1. is operated by the Appellant firm. I do not regard the contracting activities and the plant hire activities as two separate primary uses because it is clear that: they are both operated by Elding & Sons; they involve largely the same stock of vehicles, plant and equipment; they use the site in essentially the same way. Use 2. is distinguished from Use 1. as the activities are not under the direct control of Elding & Sons, but of McDermott Construction Ltd and others, and as Use 2. does not include a plant hire element.

64. With regard to Use 3. I conclude that the greater part of the repair activity taking place at the appeal site involves the provision of repair services to customers not based at Six Tunnels Farm. I do not view the mechanical repairs and the grit blasting activities as separate primary uses as they are closely linked functionally and are both activities of a general industrial kind. Use 3. takes place mainly in the buildings in the south corner of the site, but I find that some repair activity, and parking ancillary to the use, takes place in the yard. Use 1. also involves repair activities. In all these circumstances I find Use 3. to be one component of the mixed use of the appeal site planning unit and not a sole primary use of a separate planning unit comprising the buildings hatched on Plan A. As to Use 4. it is clear that at the time of the inquiry substantial parts of the appeal site were used for the long term stationing of disused vehicles, plant and equipment. Although many of these items may have been actively used in the Appellant's enterprises in the past I consider that they no longer form part of Use 1., or indeed of Uses 2. and 3. Use 4. is essentially a form of waste disposal of discarded items, with a very low level of activity. The Appellant referred to the cannibalisation of these items but very little evidence was produced about that and I regard it as de minimis. The disused items also include a small proportion of farm equipment, not much related to the other activities in the yard.

65. I conclude also, on the balance of probability, that the mixed use of the appeal site at the date of the inquiry, which I have described briefly in paragraph 62 above, was also taking place at the date of the Appellants application to the Council, 10 October 1994, and at the dates of the subsequent amendments to the application, 8 August 1995 and 3 January 1996.

66. Comparing the definition of the use of the appeal site set out at paragraph 62 with the Appellant's description of the use in the original application and the amended application I take the view that the Appellant's descriptions do not define properly what was going on on the land at the relevant time. However I am in no doubt that the application and amended application were intended to label the self same use that I have identified. In the circumstances I consider that, should he wish to do so, it would be open to the Secretary of State, under Section 195(2) of the 1990 Act, to modify the description of the use set out in the Appellant's application to include the wording set out in my paragraph 62.

67. I now consider whether the use which I have described in outline in paragraph 62 was lawful at the date of the application. For it to be lawful the Appellant has to show that the use of the planning unit at the date of the application, or a use not materially different from it, began more than 10 years before the date of the application, that is, essentially, before 10 October 1984.

68. A substantial amount of evidence was produced for the Appellant firm, including relevant contemporary documentation, about the use of the site for the period before and around October 1984. From this evidence I am in no doubt that at that time the appeal site formed a separate planning unit in use for a mixed use comprising the four primary uses which I have identified as taking place at the date of the inquiry and of the application. It appears that there have been some changes to the activities taking place on the site since 1984, including some intensification of the overall use of the site, as evidenced by the sequence of air photographs, and changes to the stock of vehicles associated with Elding and Sons's groundwork contracting activities. However I conclude that all four components of the mixed use have continued

throughout the period and that the changes which have occurred have not been such as to involve a material change in the use of the land, whether by intensification or whatever. Accordingly I conclude that the use which I have described in outline in paragraph 62 is a lawful use.

69. Section 191(1)(c) of the 1990 Act requires an applicant for a Certificate to "describe" the use and Circular 10/97 indicates that a Certificate should state the characteristics of the use so as to define it unambiguously. In my view the definition of the use set out in the Appellant's application (paragraph 1.c. above) does not meet these requirements. It is far too unspecific. However in the light of the evidence put to the inquiry I consider that a satisfactory description of the use can be provided in this case. The purpose of "describing" the use in detail is to provide a point of reference against which any future intensification of the use can be compared.

70. On this basis and in the light of all of the evidence I conclude, on the balance of probability, that a full description of each of the components of the mixed use should include the following:

- (i) Use 1. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
 - Groundwork contracting;
 - stationing of; one 15 tonne lorry, two large vans; one low loader tractor unit; four trailers; one Landrover; ; one JCB; three Caterpillar tractor units with shovels; one Drott machine; three small concrete mixers.
 - Plant hire;
 - hire of all of the items listed under "groundwork contracting" with the exception of the two vans, the low loader tractor unit, the four trailers and the Landrover.
- (ii) Use 2. - Days and hours of use;
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday no use.
 - Stationing of; three lorries; four vans; two JCBs; three small dumper trucks; two rollers; 5 compressors; one small concrete mixer.
 - Stationing of two four wheel lorries.
- (iii) Use 3. - Days and hours of use:
 - Monday to Friday 08.00 hrs to 19.00 hrs
 - Saturday 08.00 hrs to 13.00 hrs
 - Sunday 08.00 hrs to 13.00 hrs.
 - Mechanical repairs and maintenance; not more than two vehicles or items of plant or equipment under repair or maintenance on any one day.

- grit blasting and spraying; not more than one vehicle or item of plant or equipment being sand blasted and/or sprayed on any one day.

(iv) Use 4. - Days and hours of use:

- Monday to Friday 08.00 hrs to 19.00 hrs
- Saturday 08.00 hrs to 13.00 hrs
- Sunday no use.
- Long term storage of 15 disused items (a mixture of lorries; vans; JCB or Caterpillar tractor units with shovels; dumper trucks; compressors; concrete mixers).

71. The main considerations which led me to the descriptions set out in paragraph 70 are as follows. I take the view that the level of use to be described in this case should be that existing 10 years before the date of the application, that is on 10 October 1984. I have proceeded on that basis. There is no evidence that the level of use of the site was greater at an earlier date. I have reached my conclusions as to the scale of each of the primary uses in 1984 on the basis of the specific evidence relating to each use considered at the inquiry. I have not used an overall measure of intensity based on the evidence of the air photographs, as suggested by the Appellant. Although the air pictures do provide important information they give no indication of the purposes for which items visible on the photographs were stationed on the land and the information they show cannot be related directly to the other more specific evidence concerned with individual primary uses. As to Use 1. good evidence was put in for the Appellant concerning the quantity of vehicles, plant and equipment used in the contracting and plant hire activities at the relevant time. In my view that provides a reasonable measure of the level and character of Use 1. then. Regarding Use 2. the information produced by McDermott Construction Ltd gives a reasonable indication of the quantity of vehicles, plant and equipment stationed on the site by that firm in the early 1980s. I have used that as the basis for my description of Use 2. Little specific evidence was provided about the level of use of the site by other firms. Such use appears to have been generally small in scale by comparison with the use by McDermott's. I consider it appropriate to list two four wheel lorries to represent this part of Use 2.

72. I take the view that Use 3. has operated at a low intensity over the years. Grit blasting, for example, at the present time continues to use basic equipment and is centred in a makeshift, albeit quite large, building. The level of activity described for Use 3. in paragraph 70 above comes from Mr Elding's oral evidence. That appears to me to give a reasonable indication of the scale of the use. The evidence shows Use 4. to have a very static character, with the vehicles and other items stored often remaining untouched for long periods, a form of waste disposal. The use appears to me to have occupied wide areas of the site over the years with the disused items thinly spaced. I consider that the reference to 15 mixed items is a reasonable description of the scale of this use at the date of the application. The Council did not challenge Mr Elding's evidence about the days and hours of use of the buildings on the appeal site. I accept it too. Bearing in mind the general manner in which the site as a whole is used I conclude, on the balance of probability, that the days and hours of use of the rest of the site have been generally the same as those applying to the buildings. However I have also taken account of the observations of Mr Bromley about Sunday working.

73. In my view it would be open to the Secretary of State, should he wish to do so, to modify the description of the use the subject of the application, under Section 195(2) of the Act, to include also the wording set out in my paragraph 70 above.

74. Most of the evidence considered at the inquiry had been put to the Council before they determined the application. But some important new evidence was produced at the inquiry by the Appellant, including more details of the characteristics of the mixed use of the site over the relevant period. The Council questioned whether it is open to the Secretary of State to consider such new evidence. In my view the Secretary of State does have that discretion. The Council had the opportunity to identify, and test, the new evidence, and this they did. In my view it would not be proper for the Secretary of State to set aside relevant evidence made available to him through the appeal process. The statute requires him to decide whether a local planning authority's refusal of a Certificate was well founded. It does not require him to confine himself to examination of the local planning authority's reasons for that refusal, or to make his decision only on the basis of the evidence put to the Council at application stage.

75. Having regard to the limitations of the description of the claimed lawful use set out in the Appellant's application and to the limitations of the evidence put to the Council in the first instance I can appreciate why the Local Planning Authority decided to refuse the Certificate applied for. However in the light of all of the evidence now put to the inquiry I have concluded that the case for the granting of a Certificate has been made out. In my view a Certificate may be granted on the basis set out in paragraphs 62 and 70 above. In the circumstances I conclude that the Local Planning Authority's refusal to grant a Certificate of Lawfulness of Existing Use was not well founded.

RECOMMENDATION

76. I recommend that the appeal be allowed and that a Lawful Development Certificate be granted in the terms set out in paragraphs 62 and 70 of this report.

I have the honour to be
Sir
Your obedient Servant



INSPECTOR

APPEARANCES

FOR THE APPELLANT

Mr D P Bromley FRICS

- Faulkners, 49 High Street,
Kings Langley, Herts

He conducted the Appellant's case, gave evidence himself and also called:

Mr F Elding

- Representative of the
Appellant company

Mr R A Corby

- Kilbracken, Hudnall
Common, Little Gaddesden

FOR THE LOCAL PLANNING AUTHORITY

Mrs A Walker

- Senior Solicitor with the
Council

She called:

Mrs H Higenbottam
BA MRTPI

- A Senior Planning
Officer with the Council

DOCUMENTS

Document 1 - List of persons present at the inquiry

Document 2 - Notice of inquiry and circulation list

Document 3 - One law report put in for the Appellant

Document 4 - Proof of evidence and Appendices: Mr Bromley

Document 5 - Proof of evidence and Appendices: Mr Elding

Document 6 - Estimates of numbers of plant and machinery at various dates
put in for the Appellant

Document 7 - Two law reports put in for the Council

Document 8 - Proof of evidence and Appendices: Mrs Higenbottam

Document 9 - The Council's letter to the DoE 22 January 1997

Document 10 - Red summary account book 1977 - 89 put in by the Appellant

Document 11 - Bundles of invoices relating to plant hire 1983 - 85 put in
by the Appellant

Document 12 - Four invoice books relating to contracting activities 1983 -
85 put in by the Appellant

PLAN

Plan A - Copy of application plan

PHOTOGRAPH

Photograph 1/1-3 - Three air photos of the appeal site, 1980, 1988 and 1990