The Planning Inspectorate

Appeal Decision

Inquiry held on 19 and 20 June 2013

Site visit made on 19 June 2013

by John Murray LLB, Dip.Plan.Env, DMS, Solicitor

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 23 July 2013

Appeal Ref: APP/Q0505/X/13/2193066
27 Babraham Road, Cambridge, CB2 0RB

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Mr Toni Coppolaro against the decision of Cambridge City Council.
- The application Ref 12/1438/CLEUD, dated 8 November 2012, was refused by notice dated 7 January 2013.
- The application was made under section 191(1)(a) and (c) of the Town and Country Planning Act 1990 as amended.
- On the face of the application, the use for which a certificate of lawful use or development is sought is:
  (i) The storage of four ice cream vans at the property;
  (ii) The stationing of a refrigerated storage unit at the property;
  (iii) The acceptance of deliveries in connection with the ice cream business at the property;
  (iv) The mixed use (C3/B1) of the property.

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Decision.

Application for costs

1. At the Inquiry an application for costs was made by Mr Toni Coppolaro against Cambridge City Council. This application is the subject of a separate Decision.

Procedural and background matters

2. All evidence at the Inquiry was taken on oath.

3. On 28 April 1993, planning permission Ref C/0133/93 was granted for the erection of a detached domestic garage in the front garden of the appeal property. No conditions were imposed to restrict the use of the garage. On 20 August 1997 planning permission Ref C/97/0695/FP (the 1997 permission) was granted for "the use of the land and buildings at 27 Babraham Road as a dwelling house and for the storage of two ice cream vans used for commercial purposes. That permission was subject to 4 conditions, as follows:

   (1) The number of ice cream vans stored at the premises shall not exceed two vehicles;

   (2) The ice cream vans, when not in use, shall be stored within the existing garage at all times with the doors closed;

(3) There shall be no deliveries to the premises associated with the ice cream business;

(4) The garage shall be used for the parking of no more than two ice cream vans and the parking of domestic vehicles only and for no other purpose without express consent in writing to be given by the local planning authority.

4. On 13 July 2001 the Council granted planning permission Ref C/01/0558/FP (the 2001 permission) for the erection of a 2 bay car port extension to the existing 3 bay garage, which was granted permission under Ref C/0133/93. No conditions were imposed regulating the use of that extension.

5. As set out in the heading of this decision, the LDC application sought to establish, among other things, that the "mixed use (C3/B1) of the property" was lawful, as at the date of the application. However, as mixed uses do not fall within any particular use class[1] the parties agreed that any LDC should not refer to use classes.

6. Although the Council initially took a different view, at the Inquiry, the parties agreed that the 1997 permission authorised a mixed use of No 27 Babraham Road, which comprises a single planning unit, albeit that the commercial element of the mixed use was strictly limited and controlled by the conditions set out above. Notwithstanding the terms of part (iv) of the LDC application, as set out in the heading, the appellant does not seek to argue that there is a more general and extensive lawful business of the type described in Class B1. The appellant merely asks for an LDC in relation to a mixed use comprising the uses described in the 1997 permission, without complying with the conditions, along with use for the stationing of a refrigerated storage unit. Some of the evidence adduced by the Council was aimed at demonstrating that there was a material intensification of the business use within the 10 years up to the LDC application. However, in closing, the Council accepted that, as the appellant is not seeking to establish that a more general and extensive business use has become lawful, it is not necessary to pursue the intensification argument.

Main Issue

7. I must determine whether the Council's refusal of an LDC was well founded. Having regard to the background set out above, the main issue is whether the appellant has proved on the balance of probability that the use of the property as a dwellinghouse and: (i) for the storage of up to 4 ice cream vans for commercial purposes, in breach of conditions on the 1997 permission; (ii) for the acceptance of deliveries in connection with the ice cream business, in breach of conditions on the 1997 permission; and (iii) for the stationing of a refrigerated storage unit, all commenced on or before 8 November 2002 and continued for 10 years after commencement. In relation to (i) and (ii), I must also determine whether the appellant has proved on the balance of probability that the relevant conditions were still being breached as described when the LDC application was submitted on 8 November 2012[2].

[1] *Belmont Riding Centre v Secretary of State for Transport, Local Government and the Regions [2002] EWCA Civ 169.*

[2] To succeed on an LDC application concerning the failure to comply with a condition, the breach must be in existence at the time of the application: *Nicholson v Secretary of State for the Environment and Maldon District Council [1998] JPL 553.*

8. It is not for me to consider whether the matters the subject of this appeal are acceptable in planning terms; I can only determine whether they are lawful by virtue of being immune from enforcement action.

Reasons

9. As far as the number of ice cream vans is concerned, the appellant acknowledges that, as at the date of the LDC application, he only had 3 stored at the property. The fourth van was sold in February 2012, some 9 months before the application. Although the appellant says he has also stored a jacket potato trailer on the premises from August 2011 to the present date, this cannot contribute to a breach of condition 1 of the 1997 permission, which relates specifically to ice cream vans. At best then, I could only grant an LDC for the storage of up to 3 ice cream vans.

10. Mr and Mrs Coppolaro's evidence was that, in breach of condition 1 of the 1997 permission, between 1997 and the date of the LDC application, there has never been fewer than 3 ice cream vans stored at the appeal property. This was corroborated by the sworn oral testimony of Mr Iodice, the accountant and company secretary of the appellant's business, Toni's Ices.

11. In his proof, Mr Beaumont, of No 29 Babraham Road, said that he had never seen as many as 4 ice cream vans stored at the property during 2012. In oral evidence he said that until 2006 he was abroad on business for much of the time and did not pay much attention to the area. Under cross examination, his evidence on this aspect was a little confusing. At one point he suggested that there had only been 2 ice cream vans for some of the relevant 10 year period, but then he said he regularly saw 3 or 4, but believed some of them may have belonged to other dealers. The basis of that belief was unclear but, in any event Mr Beaumont 's letters to the Council dating from 15 June 2001 and sometime after August 2012[3] indicated that conditions on the 1997 permission, including condition 1, had been breached since 1997. I accept that Mr Beaumont's letters were not written in the context of a claim for immunity from enforcement action and he may not have been aware of the consequences of what he was alleging. Nevertheless, Condition 1 would only have been breached if there had been at least 3 ice cream vans stored on the premises. The other next door neighbour, Mr Cinque, said that he had lived at No 25 since 2001. In his proof, Mr Cinque said that there were not 4 ice cream vans stored at the appeal property when he entered in 2001. In oral evidence, he could not really remember how many ice cream vans had been stored during the relevant 10 year period, but he had probably seen 2 or 3. It was apparent from my inspection that Mr Cinque would not have had a view of the garage bays from his own property.

12. I accept that documents provided by the appellant, including registration documents, servicing invoices, receipts and insurance records, do not clearly demonstrate in themselves how many ice cream vans were stored on the property at any one time. This is especially so since the appellant says he often transferred personalised number plates between vehicles. However, neither do the documents indicate that the substance of what Mr and Mrs Coppolaro say about the number of ice cream vans is untrue. The evidence before me indicates that there were probably no fewer than 3 ice cream vans stored on the property in breach of conditions 1 and 4 throughout the period 8

[3] In response to application reference 12/1107/S73.

November 2002 to 8 November 2012. Indeed there is nothing which clearly contradicts the appellant's evidence.

13. In relation to condition 2 of the 1997 permission, whilst I have heard no evidence that ice cream vans have been consistently stored other than in the garage, the appellant's evidence that the garage doors have not been closed was corroborated by Mr Beaumont's evidence when he said in his proof that the garage doors were "rarely closed". The Council accepts that there is sufficient evidence of this breach of condition 2.

14. There was some debate over whether condition 2 of the 1997 permission would prevent ice cream vans being stored in the 2 bay garage extension constructed pursuant to the 2001 permission. The 2001 permission included an 'informative' indicating that the extension could not be used for the storage of commercial vehicles without express permission, but no condition to that effect. There is therefore nothing in the 2001 permission itself preventing use of the extension to store ice cream vans. I also accept the appellant's submission that, where a building has a permitted use, a permitted extension to that building could normally be used for the same purpose. However, condition 2 of the 1997 permission restricted the use of the property as a whole. When it limited storage of ice cream vans to storage within the "existing garage", that meant the existing 3 bay garage shown on the application plan. The Council would have to consider whether it would be expedient to enforce against the storage of ice cream vans within the 2 bay extension. Nevertheless, as I have not heard evidence of such storage for the relevant 10 year period, I cannot certify storage within that extension as lawful.

15. Turning to the matter of deliveries. Mr Beaumont says that there has been a significant increase in deliveries and activity on the appeal site since around 2006 and M Cinque refers to an increase in activities during the last couple of years. I am conscious that this alleged increase coincides with Mr Beaumont's retirement and consequent ability to observe a lot more and that, on the other hand, Mr Cinque says he is not in a good position to comment on deliveries because he works away from home during the day. In any event, as I have already indicated, the question of whether there has been a material intensification of the use of the property, so as to effect a fundamental change in the character of that use, is not relevant to the issues in this appeal. I merely have to determine whether condition 3 of the 1997 permission has been consistently breached for 10 years up to and including 8 November 2012 by the acceptance of deliveries to the premises associated with the ice cream business in a way that is more than de minimis.

16. The Council accepts that the breach of condition 3 became persistent, continuous and material some time around 2006, when neighbours became demonstrably aware of the deliveries. It also concedes that there may have been some deliveries in the years prior to 2005, but contends it would have been difficult for the Council to have proven that these were any more than occasional.

17. Mr and Mrs Coppolaro state that they have accepted deliveries of ice cream products at the appeal property since 1997. That was corroborated by the oral sworn testimony of Mr Iodice and, in relation to the period from 2000, by that of Mr Tanzarella, a director of Franco's Ices Ltd. With reference to the disputed period between 2002 and 2005/6, Mr Tanzarella said that from late 2000 to

date, his company delivered ice cream products (both ice cream mix and lollies) to the appeal property, 2 or 3 times a month during the summer months and throughout the year. He said that, up to 2007, he generally made the deliveries personally. Statutory declarations from both the managing director and a driver of Greco Brothers Ltd state that they delivered ice cream cones and wafers to the appeal property 2 or 3 times per year throughout the 11 years leading up to May 2013. In a further statutory declaration, the sales manager of the former company, Dairyland Ices (East Anglia) Ltd, said that from September 1997 to November 2005, as well as visiting regularly, he caused deliveries of ice cream products to be made to the appeal property on a weekly basis during the summer months and less often throughout the remainder of the year.

18. Though representatives of Greco Brothers Ltd and Dairyland Ices (East Anglia) Ltd did not attend the Inquiry, there is no evidence that their statutory declarations are untrue. Furthermore, whilst the supporting documentary evidence is a little patchy for the disputed period, the appellant produces copy invoices for ice cream products dating from 29 May 2002, 24 January 2003, 31 January 2003, 15 April 2003, February/April 2004, 13 July 2004 and from February 2005 for nearly every month to mid 2006. I note the Council's concern that this documentary evidence comprises invoices, rather than delivery notes and, whilst the address stated on them is the appeal property, this does not mean the goods were delivered there. The appellant said he did not generally keep delivery notes and, as his accountant, Mr Iodice said it was more important to keep invoices. Furthermore, whilst the Council points to a hand written note on one invoice which says "Del to Windsor Road", this could well suggest that all the other invoices which do not bear such a note relate to deliveries made to the invoice address, namely the appeal property. In addition, Mr Beaumont's letters to the Council dating from 2001 and 2012 also indicate that condition 3 had been breached from 1997.

19. To the extent that some of the appellant's business activities may have been conducted from Windsor Road and/or Winship Road, that is not relevant to whether condition 3 has been breached. The appellant does not need to prove that the appeal property was his sole place of business. Similarly, changes in the structure of the appellant's business, as a result of bankruptcy or otherwise have no bearing on this matter; I need only find that deliveries have been made to the appeal property in connection with the ice cream business throughout the period 8 November 2002 to 8 November 2012 inclusive. The evidence demonstrates that on the balance of probability. Furthermore, as a matter of fact and degree, I am satisfied that the deliveries were more than de minimis and there were not significant periods when deliveries were not being made. In making that judgement, I have taken account of the fact that there will inevitably be fewer deliveries in connection with an ice cream business during the winter months. On the evidence, I am unable to specify the number or frequency of deliveries which is lawful. Granting an LDC without quantifying this might suggest a 'free-for-all' but, in practice, deliveries will be limited by the number of ice cream vans, the size of the site and the size of the refrigerated unit, to which I now turn.

20. I note that the appellant's statutory declaration submitted in support of the LDC application exhibited a photograph of the refrigeration unit as it is now and stated that it had been on the property since 1997. In his proof, the appellant said that the unit in the photograph had only been on site since 2001 and that

it was vehicle mounted at first and then dismounted in 2010, when the vehicle was scrapped. Under cross examination, the appellant said the statement in the statutory declaration was an error. Although he had a refrigeration unit on a trailer from 1997, the one pictured was not present until 2001. The statutory declaration submitted by Mrs Coppolaro did say that the unit was on site from 2001, but dismounted from the vehicle in 2010. The contradiction in the appellant's own evidence is unfortunate, but it would appear to have been an error.

21. Mr Tanzarella said that he delivered to the appeal property from 2000, when and there was a refrigeration unit on a trailer the site in 2000, but this was changed to the current one after a year or so. He said that, when he delivered items he put them in the refrigerated unit. This is consistent with the appellant's evidence at the Inquiry and Mr Tanzarella also confirmed that the unit was dismounted in 2010. It was not put to him that he was mistaken or lying about this aspect. Further statutory declarations from Duncan Bennett (managing director of Bennetts Foods (Worcester) Ltd), Ian Knights (director of Pro-lec Electrical Solutions Ltd, formerly of Ian Knights Electrical Contractors) and Ian Ling (director of ISL Refrigeration Ltd) are also relevant on this point. Mr Bennett says he supplied the refrigerated unit in the spring of 2002 and, whilst it was originally vehicle mounted, it is nonetheless the same unit in the same location. Mr Knights says that, between November 2001 and January 2002, he installed the three phase electricity supply for the refrigeration unit, which was vehicle mounted at the time. Mr Ling says he has been carrying out regular maintenance and repair to this refrigeration unit since 2002. He confirms that it was vehicle mounted until about 2010.

22. There is a slight discrepancy in that Mr Bennett said in writing that the refrigerated unit was supplied in the spring of 2002, whereas the appellant said that it was 2001. The appellant suggested that Mr Bennett may have been looking at his records of when ownership transferred, rather than when delivery took place. This demonstrates the limitations of written evidence which cannot be tested. However, all of the sworn evidence, oral and written, on behalf of the appellant indicates that the current refrigeration unit, albeit initially vehicle mounted, has been stationed on the appeal site since the end of 2001 or the spring of 2002. Whatever the precise date, the appellant's evidence indicates that it has been there since well before 8 November 2002.

23. This of course is contradicted by the evidence of Mr Beaumont, who says that the refrigerated vehicle was brought onto the site in 2006, though he does confirm that the unit was dismounted from the vehicle about 18 months prior to May 2013. In his proof, the other neighbour, Mr Cinque said the refrigerated unit had only been on site for "a couple of years". In answer to my questions, he said in fact it had originally been there on a vehicle from about 2005/6. Aside from an obscure glazed window and the side panes of a box bay, none of the windows of Mr Cinque's house face the area where the refrigeration unit is located. There is also a boundary wall approximately 1.8m high and boundary planting. Mr Cinque's view is therefore limited, though not completely obscured.

24. Although there is some intervening boundary planting, Mr Beaumont's house includes first floor bedroom windows in the side elevation, overlooking the area where the refrigerated unit is located. The conflict between his evidence and that of the appellant and his witnesses is therefore difficult to resolve. I do not

believe that Mr Beaumont lied about the time when the refrigerated unit came on site. Although aspects of his evidence were confusing, I am sure that he gave an honest account, to the best of his recollection. However, as indicated, he was working abroad a great deal, for up to 9 months a year, until around 2006. Following his retirement, Mr Beaumont was able to take closer note of what was happening on the appeal site. I accept that, even before that, his family could have informed him of events on the site, but they were not at the Inquiry to clarify the position.

25. In any event, aside from Mr and Mrs Coppolaro's own evidence, sworn written evidence from people who separately supplied and maintained the refrigeration unit and provided it with an electricity supply is compelling. The oral evidence on oath from Mr Tanzarella, who delivered goods to the site and personally loaded them into the current refrigeration unit from 2001 is also convincing and was not challenged by the Council. Mr Beaumont and Mr Cinque can be forgiven for being mistaken over the date of arrival of the refrigeration unit. If the evidence of the appellant and his witnesses were to be set aside, that would suggest that there had been a conspiracy to lie on oath. I am not persuaded that this is the case and, for the reasons given, I prefer their evidence and I am satisfied on the balance of probability that the refrigeration unit was stationed on the appeal site from spring 2002 at the latest. Although the appellant acknowledged that, when it was still vehicle mounted, he occasionally took the refrigerated unit out to collect ice cream, I am satisfied that these were de minimus interruptions in the continuity of the use.

26. As I am concerned with the use of land, it is not the specific refrigerated unit that is relevant. However, I will indicate that the stationing of a refrigerated unit of the size currently on site, or smaller, is lawful. This will not operate as a condition and does not necessarily indicate that the stationing of a larger unit would not be lawful. It merely sets a base line against which the materiality of any future change could be assessed.

Overall conclusions

27. For the reasons given and having regard to all other matters raised, I conclude on the main issue that the appellant has proved on the balance of probability that the use of the property as a dwellinghouse and: (i) for the storage of up to 3 ice cream vans for commercial purposes, in breach of conditions on the 1997 permission; and (ii) for the acceptance of deliveries in connection with the ice cream business, in breach of conditions on the 1997 permission; and (iii) for the stationing of a refrigerated storage unit, all commenced on or before 8 November 2002 and continued for 10 years after commencement. In relation to (i) and (ii), the appellant has also proved on the balance of probability that the relevant conditions were still being breached when the LDC application was submitted on 8 November 2012.

28. Accordingly, the Council's refusal of the LDC was not well founded and I will allow the appeal. For the reasons given, I will grant an LDC limited to breaches of the relevant conditions and use for the stationing of a refrigerated storage unit. It will not encompass a more wide ranging B1 type business use.

Decision

Appeal Ref: APP/Q0505/X/13/2193066

29. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the existing use and matters constituting a failure to comply with conditions which are considered to be lawful.

J A Murray

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Philip Kratz BA(Hons) Solicitor LMRTPI	Instructed by the appellant
He called	
Toni Coppolaro	Appellant
Tracy Coppolaro	Appellant's wife
Givanni Iodice	Appellant's accountant
Pasquale Tanzarella	Supplier

FOR THE LOCAL PLANNING AUTHORITY:

Penny Jewkes	Non practising barrister, employed by Cambridge City Council
She called	
Catherine Linford BA(Hons), MSc MRTPI	Senior Planner, Cambridge City Council
Claudio Cinque	Neighbour
Terry Beaumont	Neighbour

DOCUMENTS SUBMITTED AT THE INQUIRY

1 Letter from Terry Beaumont to the Council referred to in the letter from Sarah Dyer dated 12 November 2012, which was submitted with the Appeal Questionnaire
2 Application plan for planning permission Ref C/97/0695/FP
3 Invoice dated 9 March 2001 for Vanilla Liquid Mix
4 Norwich Union renewal schedule 13 April 2007
5 Reliance Garage list of diesel purchases April 2003
6 Letter from Slade Edwards & Co insurance brokers 12 October 2012
7 Design and Access Statement dated August 2012 submitted with the application to amend conditions on planning permission Ref C/97/0695/FP
8 Closing submissions for the Council
9 Closing submissions for the appellant
10 Appellant's costs application
11 E-mail correspondence between the appellant's solicitor and the Council 30 November 2012; 4 December 2012, 4 - 6 December 2012; 2 & 3 January 2013

The Planning Inspectorate

Lawful Development Certificate

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

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on 8 November 2012 the use and matters constituting failures to comply with conditions or limitations subject to which planning permission has been granted all described in the First Schedule hereto, in respect of the land specified in the Second Schedule hereto and edged and hatched in black on the plan 'A' attached to this certificate, were lawful within the meaning of section 191(2) and (3) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The time for enforcement action had expired.

Signed

J A Murray

Inspector

Date: 23 July 2013

Reference: APP/Q0505/X/13/2193066

First Schedule

The use of the property as a dwellinghouse and: (i) for the storage of up to 3 ice cream vans for commercial purposes in the garage referred to in conditions 2 and 4 of planning permission reference C/97/0695/FP dated 20 August 1997 (the 1997 permission) and shown cross-hatched in black on the plan 'B' attached to this decision, but with the garage doors open, in breach of conditions 1, 2 and 4 of the 1997 permission; (ii) for the acceptance of deliveries in connection with the ice cream business, in breach of condition 3 of the 1997 permission; and (iii) for the stationing of a refrigerated storage unit, of a size equivalent to or smaller than the unit stationed on the site on 8 November 2012, as shown on the photograph attached to this decision, and located between the dwelling and the garage as extended.

Second Schedule

Land at 27 Babraham Road, Cambridge, CB2 0RB

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use and matters constituting a failure to comply with any condition or limitation subject to which planning permission has been granted 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.

This certificate applies only to the extent of the use and matters described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use or matter 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.

The Planning Inspectorate

Plan

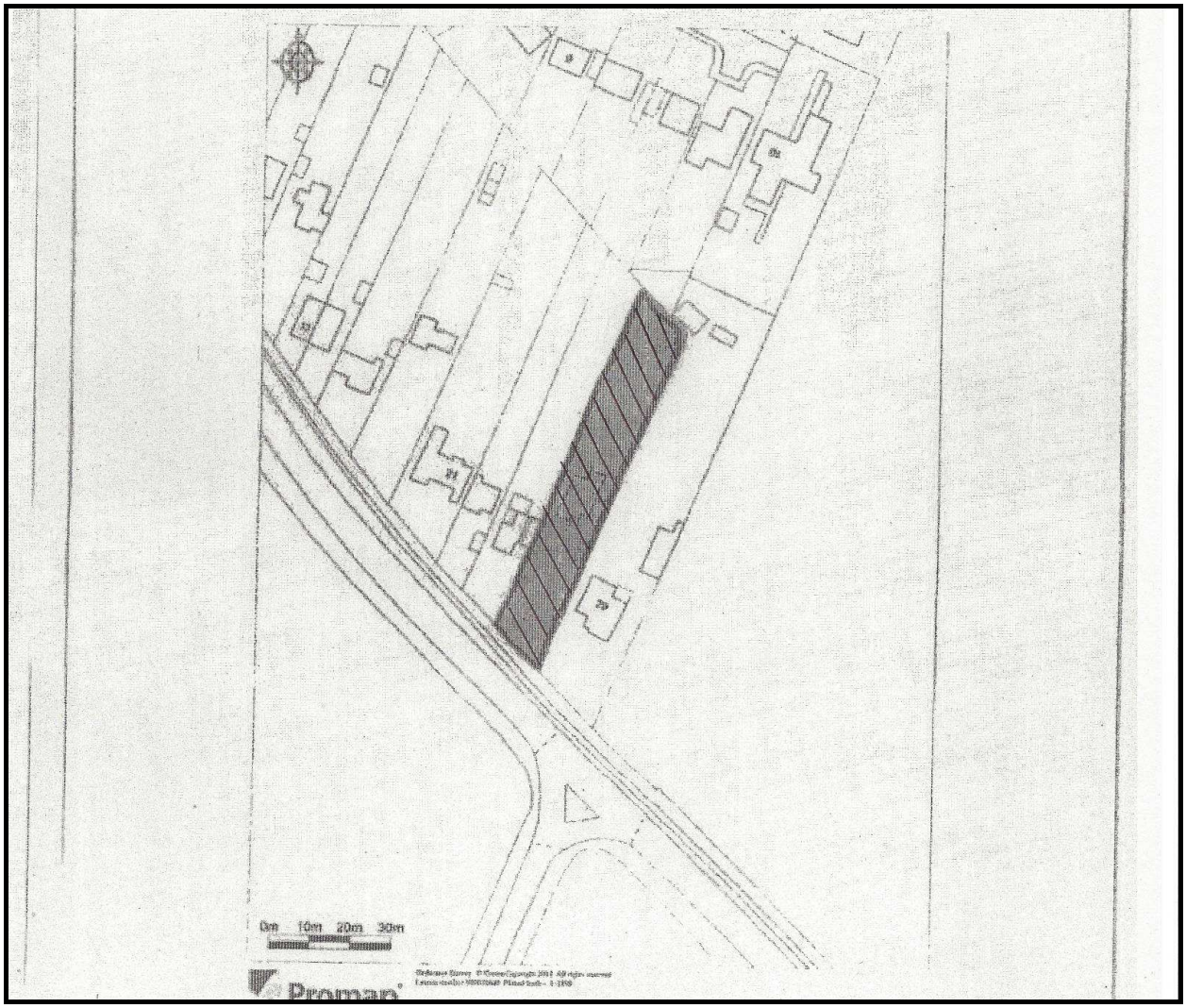
This is the **plan 'A'** referred to in the Lawful Development Certificate dated: 23 July 2013

by John Murray LLB, Dip.Plan.Env, DMS, Solicitor

Land at: 27 Babraham Road, Cambridge, CB2 0RB

Reference: APP/Q0505/X/13/2193066

Scale: DO NOT SCALE



The Planning Inspectorate

Plan

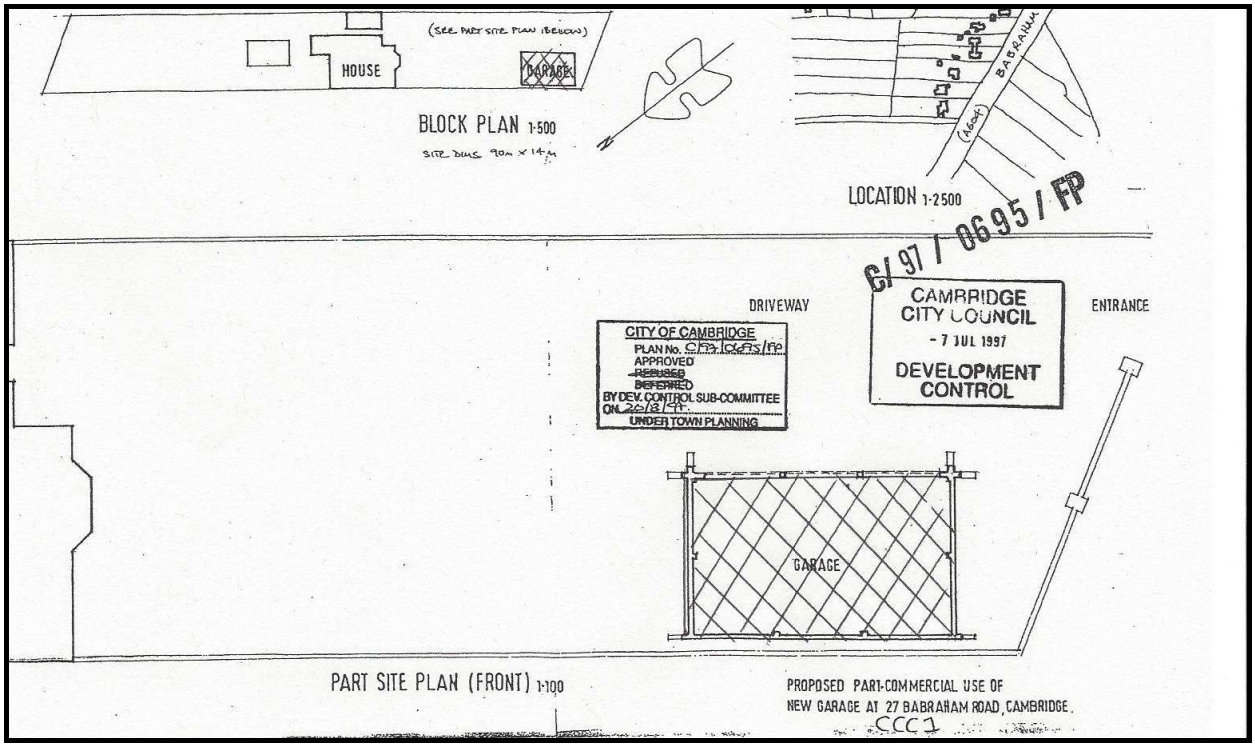
This is the **plan 'B'** referred to in the Lawful Development Certificate dated: 23 July 2013

by John Murray LLB, Dip.Plan.Env, DMS, Solicitor

Land at: 27 Babraham Road, Cambridge, CB2 0RB

Reference: APP/Q0505/X/13/2193066

Scale: DO NOT SCALE



The Planning Inspectorate

Photograph

This is the photograph referred to in the Lawful Development Certificate dated: 23 July 2013

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