

**IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
PLANNING COURT**

Royal Courts of Justice
Strand, London, WC2A 2LL

6 May 2016

B e f o r e :

MRS JUSTICE LANG DBE

Between:

**THE QUEEN
on the application of**

JAMES WATERS

Claimant

- and -

BRECKLAND DISTRICT COUNCIL

Defendant

**CCL HOLDINGS LIMITED
CROWN CHICKEN LIMITED**

**Interested
Parties**

**Richard Turney (instructed by Richard Buxton Environmental and Public Law)
for the Claimant**

**Christopher Lockhart-Mummery QC (instructed by Breckland District Council)
for the Defendant**

Richard Moules (instructed by Howes Percival) for the Interested Parties

Hearing dates: 19 & 20 April 2016

Mrs Justice Lang :

1. The Claimant applied for judicial review of the Defendant's decision:
 - i) to grant a certificate of lawfulness in respect of operational development, dated 8 July 2015; and
 - ii) to refuse to take enforcement action, as stated in the Defendant's solicitor's response to the Claimant's pre-action protocol letter dated 13 August 2015;
- at Green Farm, Edge Green, Kenninghall, Norfolk NR16 2DR (“the Site”).

2. The Claimant lives in Kenninghall, near to the Site. The Interested Parties (“CCL”) own and operate a chicken hatchery and animal food mill at the Site. The Claimant has complained, amongst other matters, of noise from the mill and problems caused by heavy goods vehicles (“HGVs”) travelling to and from the Site along narrow roads. The Defendant Council is the local planning authority for the area.
3. Permission to apply for judicial review was granted on the papers on 23 December 2015. There was some delay because the parties requested a stay to explore a possible resolution of the matter.

Grounds for judicial review

4. The Claimant’s grounds for judicial review were:
 - i) **Ground 1:** The Council erred in law in granting a certificate of lawfulness under section 191 of the Town and Country Planning Act 1990 (“TCPA 1990”) in respect of the 44 buildings and other structures at the Site without first having considered whether the use of the Site was lawful.
 - ii) **Ground 2:** The Council erred in law in failing to take enforcement action against CCL in respect of unlawful use and operational development at the Site, as stated in its letter of 13 August 2015.
5. In March 2016, CCL made further applications for certificates of lawfulness to the Council to regularise all existing buildings and uses at the Site, including the 44 buildings and structures which were the subject of the certificate under challenge in this claim for judicial review. These applications are currently being consulted upon and will thereafter be considered by the Council, in July or August 2016. This means that much of this judicial review will soon become academic.
6. However, the parties could not agree on a stay of this claim, principally because, whilst the certificate of 8 July 2015 remained in force, it would be conclusive proof of lawfulness, pursuant to section 191(6) TCPA 1990, and that would preclude the Council from re-considering its lawfulness again on the current applications.
7. On ground 2, although the Claimant alleged that the Council had acted unlawfully in failing to take enforcement action from 2011 to 2016, in my view his legitimate claim for judicial review had to be confined to a period in July/August 2015.
8. Since a claim for judicial review against a local planning authority in respect of decisions under the Planning Acts has to be filed no later than 6 weeks after the grounds to make the claim first arose (CPR 54.5), and the Claimant filed his claim on 28 August 2015, he could not seek judicial review in respect of delay prior to about 17 July 2015. However, evidence of events, including any delay, at an earlier time could be taken into account in deciding whether or not the Council’s refusal to take enforcement action in August 2015 was lawful.
9. Delay after the date of issue of the claim on 28 August 2015 was potentially relevant to any question of relief, but could not properly be the subject of the claim for judicial review, absent any amendment to update the claim or the issue of a further claim.
10. On the first day of the hearing, the Claimant abandoned his pleaded claim for a mandatory order requiring the Council to take enforcement action in respect of the use and operations at the Site, recognising that this was a hopeless application in the light of the pending applications for certificate of lawfulness. In the course of his oral submissions, counsel for the Claimant said he was seeking a declaration but since this had not been pleaded in the claim form or grounds or even mentioned in his skeleton argument, I considered it was far too late to make such an

application. I also considered that if my judgement found that the Council had acted unlawfully, this would have the same benefit to the Claimant as a declaration.

Legal framework

11. Section 191 TCPA 1990 provides as follows:

191.— Certificate of lawfulness of existing use of development.

(1) If any person wishes to ascertain whether—

- (a) any existing use of buildings or other land is lawful;
- (b) any operations which have been carried out in, on, over or under land are lawful;
or
- (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful,

he may make an application for the purpose to the local planning authority specifying the land and describing the use, operations or other matter.

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

- (a) no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and
- (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

(3) For the purposes of this Act any matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful at any time if—

- (a) the time for taking enforcement action in respect of the failure has then expired;
and
- (b) it does not constitute a contravention of any of the requirements of any enforcement notice or breach of condition notice then in force.

(3A) In determining for the purposes of this section whether the time for taking enforcement action in respect of a matter has expired, that time is to be taken not to have expired if—

- (a) the time for applying for an order under section 171BA(1) (a “planning enforcement order”) in relation to the matter has not expired,
- (b) an application has been made for a planning enforcement order in relation to the matter and the application has neither been decided nor been withdrawn, or
- (c) a planning enforcement order has been made in relation to the matter, the order has not been rescinded and the enforcement year for the order (whether or not it has begun) has not expired.

(4) If, on an application under this section, the local planning authority are provided with information satisfying them of the lawfulness at the time of the application of the use, operations or other matter described in the application, or that description as modified by

the local planning authority or a description substituted by them, they shall issue a certificate to that effect; and in any other case they shall refuse the application.

...

- (6) The lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed.

...

- 12. “Development” for the purposes of section 191(2) is defined in section 55(1) TCPA 1990. It provides that “development” is the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land. Section 55(1A) provides that building operations includes the rebuilding and structural alteration and addition to buildings.
- 13. Certain defined operations or changes of use are not to be taken to amount to development, for example, a change of use within a class of use for which permission has been given, as set out in the Town and Country Planning (Use Classes) Order 1987 (section 55(2)(f)).
- 14. By section 57 TCPA 1990, planning permission is required for development. However, under section 59 TCPA 1990, the Secretary of State has made the Town and Country Planning (General Permitted Development) Order 1995 which grants permission for certain categories of development (“permitted development”) without the need for express planning permission, subject to exceptions, limitations and conditions.
- 15. Section 75 TCPA 1990 provides:
 - “(1) Without prejudice to the provisions of this Part as to the duration, revocation or modification of planning permission, any grant of planning permission to develop land shall (except as in so far as the permission otherwise provides) enure for the benefit of the land and of all persons for the time being interested in it.
 - (2) Where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used.
 - (3) If no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed.”
- 16. The term “designed” in this context means “intended” rather than architecturally designed: *Wilson v West Sussex County Council* [1963] 2 Q.B. 764, per Danckwerts LJ at 780 and per Diplock LJ at 783.
- 17. Section 336(1) TCPA 1990 provides that “planning permission” includes planning permission granted by development order. Therefore operational development granted planning permission by development order may be used for the purposes for which it was intended by virtue of section 75 TCPA 1990.
- 18. Section 172(1) TCPA 1990 gives local planning authorities power to issue enforcement notices. It provides:
 - “(1) The local planning authority may issue a notice (in this Act referred to as an “enforcement notice”) where it appears to them—
 - (a) that there has been a breach of planning control; and

- (b) that it is expedient to issue the notice, having regard to the provisions of the development plan and to any other material considerations.”
19. A “breach of planning control” is defined in section 171A(1) TCPA 1990 as either “carrying out development without the required planning permission” or “failing to comply with any condition or limitation subject to which planning permission has been granted”.
20. In *R (Aradgh Glass Ltd) v Chester City Council* [2009] EWHC 745 (Admin); [2009] Env LR 34, HH Judge Mole QC said at [47] that “*Expedience as a test suggests the balancing of the advantages and disadvantages of a course of action*”. The meaning was not in issue when the case was considered by the Court of Appeal.
21. Section 173 TCPA 1990 sets out the required contents of an enforcement notice:
- “(1) An enforcement notice shall state—
- (a) the matters which appear to the local planning authority to constitute the breach of planning control; and
- (b) the paragraph of section 171A(1) within which, in the opinion of the authority, the breach falls.
- (2) A notice complies with subsection (1)(a) if it enables any person on whom a copy of it is served to know what those matters are.
- (3) An enforcement notice shall specify the steps which the authority require to be taken, or the activities which the authority require to cease, in order to achieve, wholly or partly, any of the following purposes.
- (4) Those purposes are—
- (a) remedying the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or
- (b) remedying any injury to amenity which has been caused by the breach.
- (5) An enforcement notice may, for example, require—
- (a) the alteration or removal of any buildings or works;
- (b) the carrying out of any building or other operations;
- (c) any activity on the land not to be carried on except to the extent specified in the notice; or
- ...”
22. The time limits for taking enforcement action are set out in section 171B TCPA 1990, which provides:
- “(1) Where there has been a breach of planning control consisting in the carrying out without planning permission of building, engineering, mining or other operations in, on, over or under land, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed.

- (2) Where there has been a breach of planning control consisting in the change of use of any building to use as a single dwelling house, no enforcement action may be taken after the end of the period of four years beginning with the date of the breach.
- (3) In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach.”
23. The Secretary of State has issued policy on the use of enforcement powers. The National Policy Planning Framework (“NPPF”) provides at [207]:
- “Effective enforcement is important as a means of maintaining public confidence in the planning system. Enforcement action is discretionary and local planning authorities should act proportionately in responding to suspected breaches of planning control...”
24. The National Planning Practice Guidance (“NPPG”), issued in March 2014, states:
- “5. Effective enforcement is important to
- tackle breaches of planning control which would otherwise have unacceptable impact on the amenity of the area.
 - maintain the integrity of the decision-making process.
 - help ensure that public acceptance of the decision-making process is maintained.”
25. The NPPG, at paragraph 7, sets out suggested “*options ... available to local planning authorities to tackle possible breaches of planning control in a proportionate way*” which include “*no formal action*” and “*retrospective planning application*” as well as enforcement notices of various kinds. In considering the option of “*no formal action*”, it states:

“When might formal enforcement action not be appropriate?”

Nothing in this guidance should be taken as condoning a wilful breach of planning law. Enforcement action should, however, be proportionate to the breach of planning control to which it relates and taken when it is expedient to do so. Where the balance of public interest lies will vary from case to case.

In deciding, in each case, what is the most appropriate way forward, local planning authorities should usually avoid taking formal enforcement action where:

- there is a trivial or technical breach of control which causes no material harm or adverse impact on the amenity of the site or the surrounding area;
 - development is acceptable on its planning merits and formal enforcement action would solely be to regularise the development;
 - in their assessment, the local planning authority consider that an application is the appropriate way forward to regularise the situation, for example, where planning condition may need to be imposed.”
26. CCL submitted an Environmental Statement with the application for a certificate of lawfulness on the basis that the development fell within the Town and Country Planning (Environmental Impact Assessment) Regulations 2011, Schedule 2, 1(c), ‘Intensive Livestock Installations’ with floor space exceeding 500 sq m. The Council approached the application on the basis that it was an Environmental Impact Assessment (“EIA”) development, defined in regulation 2 as “*Schedule 2 development likely to have significant effects on the environment by virtue of factors such as its nature, size or location*”.

27. Article 2(1) of Directive 2011/92/EU provides that projects likely to have significant effects on the environment by virtue, inter alia, of their nature, size of location are made subject to a requirement for development consent and an assessment with regard to their effects.
28. In *Ardagh Glass v Chester CC* (supra), the High Court held that, if immunity were to arise through a failure to take enforcement action, it would be unlawful and a breach of the EIA Directive. In that case, the Court made an order requiring the local planning authority to take enforcement action.
29. On appeal, in *Ardagh Glass v Chester CC* [2010] EWCA Civ 172; [2010] Env LR 32, the Court of Appeal held that, in principle, community law permitted the grant of retrospective development for an unauthorised EIA development though, as recognised in *European Communities v Ireland* C-215/06, this would be an exceptional course.
30. In *R(Evans) v Basingstoke and Deane BC* [2014] 1 WLR 2034, the Court of Appeal held that the time limits for taking enforcement action in section 171B TCPA 1990 applied to EIA development.

Ground 1: the question of law

31. The Claimant submitted that the Council erred in law in granting a certificate of lawfulness in respect of the operational development on the Site, without having first considered whether the use of the Site was lawful. The Claimant contended that there had been an unauthorised change of use from agricultural to industrial/agricultural and/or there had been such an intensification of use in recent years that it amounted to a material change of use. This was a material consideration. In considering under section 191(2) TCPA 1990 whether enforcement action could be taken against the buildings, the Council ought to have taken into account that the erection of a building which results in a material change of use of land is subject to a 10 year rather than a 4 year time limit and that buildings which are an integral part of an unauthorised use may be liable to removal.
32. The Council and CCL submitted that, on a proper interpretation of section 191 TCPA 1990, an application for a certificate of lawfulness for “operations” on the land was distinct from an application in respect of the “use” of the land, and the use of the Site was not material to the statutory decision which the Council had to make. Without prejudice to this primary submission, it was apparent that on this occasion the Defendant did have regard to the use of the Site. Furthermore, even if the Court concluded that the Council had insufficiently considered the lawfulness of the use when granting the certificate, on the evidence the Council would have been highly likely to have reached the same conclusion, namely, that the certificate should be granted, and therefore relief should be refused under section 31(3D) Senior Courts Act 1981.
33. In my judgement, section 191 TCPA 1990 clearly distinguishes between operational development and use. Subsection (1) enables an applicant to make an application for a certificate in respect of (a) any existing use or (b) any operations. Consequently, an applicant is entitled to specify the nature of the development in respect of which a certificate is sought. Subsection (4) requires the local planning authority to consider the “*lawfulness at the time of application of the use, operations or other matter described in the application*”. There is nothing in section 191 to support the contention that use is a relevant consideration to be taken into account on an application in respect of operational development.
34. This distinction between operational development and use is reflected throughout the TCPA 1990 e.g. section 55 (development); section 56 (time when development begun); section 171B (time limits); section 173(3) (contents and effect of enforcement notice); section 192 (certificate of lawfulness of proposed use or development).

35. Where an applicant applies for a certificate in respect of operations, the local planning authority, in satisfying itself under subsection (4) that the operations are lawful, must consider whether “*no enforcement action may then be taken in respect of them*” (subsection (2)). Under subsection (2), as well as consideration of whether planning permission is required or has been granted, the local planning authority must consider whether “*the time for enforcement action has expired or for any other reason*”.
36. In most cases, the question whether or not the time for enforcement action has expired will be a straightforward one. The different time limits are clearly expressed in section 171B TCPA 1990. The 4 year time limit for operations and the 10 year time limit for use may result in anomalous situations, but the rationale behind these provisions was explained by Lord Mance in *Welwyn Hatfield BC v Secretary of State for Communities & Local Government* [2011] UKSC 15; [2011] 2 AC 304, at [17]:

“Protection from enforcement in respect of a building and its use are thus potentially very different matters. Mr Beesley could have applied for a certificate under subsection (1) in respect of the building as soon as July 2006 was over, but he has not done so. He has focused on the use of the building for four years, in respect of which, he submits, he must now be entitled to protection by reference to roughly, though not precisely, the same four year period. If the right analysis were that there has been no change of use within subsection (2), the only alternative analysis must, he points out, be that use of the building as a dwelling house, which is either impermissible or positively prohibited under the relevant planning permission, can be the subject of an enforcement notice at any time within a ten year period under subsection (3). I agree that that would, on its face, seem surprising. However, it becomes less so, once one appreciates that an exactly parallel situation involving different time periods applies to the construction without permission and the use of a factory or any building other than a single dwelling house. The building attracts a four year period for enforcement under subsection (1), while its use attracts, at any rate in theory, a ten year period for enforcement under subsection (3). I say in theory because there is a potential answer to this apparent anomaly, one which would apply as much to a dwelling house as to any other building. It is that, once a planning authority has allowed the four year period for enforcement against the building to pass, principles of fairness and good governance could, in appropriate circumstances, preclude it from subsequently taking enforcement steps to render the building useless.”

37. Contrary to the Claimant’s submission, I do not read Lord Mance’s summary at [30] as departing from this analysis.
38. *Welwyn* was an exceptional case in which the applicant obtained planning permission to construct a barn but instead constructed a dwelling-house, disguised within a barn structure. After 4 years, he applied for a certificate of lawful use, relying upon the expiry of the 4 year time period for enforcement for a change of use to a dwelling house. The Supreme Court set aside the certificate of lawful use under section 191(1)(a) TCPA 1990, holding that (1) there had been no change of use within the meaning of section 171B(2) TCPA 1990; and (2) that the applicant could not profit from the statutory time limits in section 171B TCPA 1990 because of his deliberate deception which was intended to undermine the planning process. In my view, it cannot sensibly be argued that there is any similarity between *Welwyn* and the facts of this case, nor that the judgements of the Supreme Court support the Claimant’s submissions on this issue.
39. The Claimant also relied upon cases in which, in the course of enforcement action against a material change of use, removal of operational development had been ordered, because it was found to be an integral part of the unauthorised change of use. He submitted that these cases demonstrated that prior consideration had to be given to unauthorised use so as to identify integral development which might be subject to removal. Once a certificate of lawfulness had been granted, subsection (6) would effectively prevent it from being the subject of an enforcement notice.

40. In *Murfitt v Secretary of State for the Environment* (1980) 40 P & CR 254, the Divisional Court held that an enforcement notice in respect of a material change of use from agricultural to the parking of heavy goods vehicles could require the land to be restored to its condition before the development took place, including removing the hardcore as well as the vehicles. It was conceded that the only purpose of the hardcore was to enable the vehicles to be parked there, and the Secretary of State submitted that the hardcore was “*so much an integral part of the use of the site for the parking of heavy goods vehicles that it cannot, and should not be considered separately*” (per Stephen Brown J. at 258, 259). Waller LJ said, at 260:

“If one wishes to see some logic in the distinction between the two types of breach – that is, a breach where the variation has existed for four years or more and a breach where that which is described as a variation is something ancillary to the use – as it seems to me, the former case is one where something is done that, on the whole, would be permanent by the mere fact that it is done and, therefore, something that should be dealt with within a period of four years, whereas in the second case, where it is a question of an ancillary purpose, the planning matter might leave land, as in this case, in a useless condition for any purpose, and therefore it is logical that, when the use which has no planning permission is enforced against, the land should be restored to the condition in which it was before that use started.”

41. In *Somak Travel v Secretary of State for the Environment* (1988) 55 P & CR 250 the High Court held that an enforcement notice in respect of a change of use from residential to office use could require the removal of an internal staircase which had been installed to connect the authorised ground floor office with the unauthorised first floor office. Stuart-Smith J. found that there was material upon which the Inspector could properly find that the staircase was integral to the material change of use as its purpose was to enable the staff on each floor of the business to communicate quickly with each other, as otherwise they would have had to go outside the building and round the back to obtain access to the offices on the first floor.
42. Both these cases turned on the proper exercise of powers under sections 172 and 173 TCPA 1990. Neither case considered the approach which a planning authority should take under section 191 TCPA 1990 to the grant of a certificate of lawful operations. I do not consider that *Murfitt* and *Somak*, both unusual on their facts, are a basis upon which the duty of a local planning authority under section 191 TCPA 1990 can or ought to be generally extended so as to require a decision on whether or not there is an existing lawful use before granting a certificate of lawful operational development.
43. In my judgement, in cases comparable to *Murfitt* and *Somak*, where it appears to a local planning authority that the operational development for which a certificate of lawfulness is sought may be subject to enforcement proceedings as an integral part of an unauthorised use, then it may properly find that it is not satisfied of the lawfulness of the operational development under section 191(4). That is a question of judgement for the local planning authority on the facts in any particular case. However, for the reasons which I address in the next section of my judgement, I do not consider that this case was comparable to *Murfitt* and *Somak*. There was no finding of unlawful use. Even on the Claimant’s case, the buildings/structures were not solely for the purpose of the alleged industrial or intensified use. On any view, there was a lawful use of the Site which had been in existence for many years.

Ground 1: the Council’s decision and Ground 2

44. The Council’s decision to grant a certificate of lawfulness, which is challenged under Ground 1, has to be assessed in the context of the planning history of the Site. The allegation of unlawful failure to take enforcement proceedings also requires an assessment of the planning history of the Site. Therefore it is convenient to consider these two issues together.

History of the Site

45. Mr Armes, an employee of CCL who has worked at the Site since 1975, provided a detailed history of the Site in his witness statement for these proceedings. The Site has been used for chicken rearing and as an animal feed mill since the 1960's. It originally comprised a mill building; a bag store; 3 storage silos; and an intake system to facilitate the unloading of raw materials. Over the years, more buildings and structures have been added; some have been expanded; and some have been demolished. The facilities have been modernised and improved, in part in response to legislative and environmental health requirements. It now comprises some 52 buildings or structures.
46. Until about 1979, the use was exclusively agricultural, as the animal feed mill was producing specialist feed for the chickens on the farms operated by the owners, B.J. Gooderham Ltd. It probably became part agricultural/part industrial at a date after the business was sold in about 1980 to Anglo European Food Group. In about 1985 the business was sold to Hillsdown Holdings Plc. In May 1993, CCL purchased the business.
47. The business now produces in excess of 200,000 tonnes of animal feed products, half of which is used for its own business and the rest is sold to other producers. Mr Armes exhibited schedules of the tonnage outputs between 1965 and 2014, and the HGV lorry movements. The business also rears and processes in excess of 525,000 birds per week. It employs over 380 people, 50 of whom work on the Site.

The Claimant's complaint and the Council's investigation

48. In May 2011, the Claimant complained to the Council about the increase in the hours of operation of the site from 5½ days per week to 7 days per week, including night time, reflecting a significant increase in production. The noise of the grinder and other operations and the frequency of HGV lorry journeys to and from the Site were adversely affecting him and others in the village. His complaints were supported by the Parish Council. He subsequently produced a magazine article which described the increase in output and the new development at the Site since 1993.
49. Mr Curtis, the Council's planning enforcement manager, gave a detailed account in his witness statement of the steps taken by Mr Moys, Principal Planning Officer, to investigate the complaint and the planning controls at the Site. Mr Moys and others at the Council checked the records of planning permissions at the Site; showed the Claimant what they had found; sought and obtained further information from the Claimant about the history of development at the Site; advised the Claimant and the Parish Council of the legal position and the options open to the Council; made visits to the Site and interviewed Mr Armes. The Council also investigated the use of the site with Environmental Protection.
50. The Council was aware that noise, dust and other emissions from operations at the Site were subject to an Environmental Permit granted by the Environment Agency, which held reports of its site inspections and audits.
51. In an Enforcement Report from Mr Moys dated 27 October 2011, he advised Mr Jackson, the Planning Manager, that that there was no record of planning permission for the original establishment of the feed mill, but it was clear that it had been established for more than 10 years. Various permissions had been granted over the previous 35 years for new building and ancillary works, mainly described as relating to agricultural activities. The evidence as to when the more recent works had been completed was in dispute. It was unclear to what extent they would have required planning permission, and whether they had acquired immunity from enforcement.
52. Mr Moys considered that the issues would be best resolved through the submission and consideration of a lawful use certificate application by CCL. A full on site audit of existing development could then be undertaken. CCL had agreed to make an application to regularise the position. Mr Moys therefore recommended that no further action be taken pending the

review of a lawful use certificate application and the position should be reviewed in 6 weeks. It appears that this recommendation was accepted by the Council.

53. In my judgement, Mr Moys and others conducted a thorough and fair investigation and the recommendation was a reasonable and lawful means of addressing the issues. It was highly relevant that CCL was co-operative and wished to regularise its activities at the Site, as evidenced by its letter of 31 October 2011.

The first certificate of lawful development

54. On 15 November 2011, CCL submitted an application for a lawful development certificate for the existing use which was described as “*Class B2 Special Industrial Group E Animal Food Manufacturing*”. The description of the existing use was “Animal Feed Compounding”, “Hatchery” and “Workshop” which was estimated to have begun in 1991. According to the officer’s report, CCL also applied for a certificate in respect of the buildings at the Site.
55. The Council consulted on the application and received objections from local residents and Norfolk County Council, the Highways Authority, expressed strong concerns about the road access which was unsafe for use by large HGVs.
56. The officer’s report advised that the mill and hatchery had been in operation for a period in excess of 10 years. A significant number of the buildings, plant and machinery had been on-site for more than 4 years, or benefited from planning permission. However, some of the development on site was less than 4 years old and so could not be included as part of the certificate.
57. On 23 July 2012, the Council granted a certificate of lawful development in respect of:
- i) the uses set out in the First Schedule which it found had subsisted since at least 13 May 2002; and
 - ii) the buildings marked on the attached plan which were either erected on or before 13 May 2008 or with the benefit of the planning consents noted on the attached drawing.
58. In August 2012, the Claimant made an application for judicial review challenging the decision to grant a certificate, on the grounds, inter alia, that an EIA assessment ought to have been obtained and considered prior to making the decision.
59. Those buildings/structures which were believed to have been present for less than 4 years and which did not have planning permission were not included in the certificate of 23 July 2012. These were the grinder house, chick shelter to the rear of hatchery, single silo, refurbished bin area to the mill and additional weighbridge. The Council undertook a full assessment of the planning implications of this development, and further consulted the local residents and the relevant authorities. Mr Christopher Raine, senior planning officer, considered what action should be taken. In a detailed report dated 1 October 2012, he recommended that the development was acceptable in planning terms and that it was not expedient to pursue enforcement action. He added that it should be noted that the unauthorised development would become lawful after 4 years if no action was taken.
60. In the event, the Council decided that none of the outstanding Kenninghall issues ought to be determined by the Planning Committee until the outcome of applications for screening directions in respect of planning applications for other proposed developments at Kenninghall (hatchery, feed bins, proposed CHP plant and renewable energy plant). The Leader of the Council, Mr Nunn, notified the Claimant that the Council had decided to seek Screening Directions from the Secretary of State. Mr Jackson and Mr Moys exchanged emails with the Claimant giving detailed explanations. The Council’s cautious approach in deferring Committee consideration of all the Kenninghall matters until the outcome of the Screening

Directions was known could not be characterised as unlawful, given the predicament in which the Council found itself with regard to the claim for judicial review, alleging that an EIA assessment was required for this Site.

61. The Claimant was granted permission to apply for judicial review on 18 July 2013 at an oral hearing. I do not have a transcript of the judgement given.
62. On 21 February 2014, the decision of 23 July 2012 was quashed by consent but only on the limited ground that the operations had been certified as lawful as at the date of the decision whereas it should have been certified as at the date of the application, and that date ought to have been included in the certificate. The annex to the order stated *“This order is agreed on the basis that it is without prejudice to the Claimant’s other grounds of claim granted permission by the Court”*.
63. Following the quashing of the decision, the Council (Mr Martin Pendlebury, Director of Planning and Business Manager) corresponded with the Claimant about the next steps, and the Claimant was given the opportunity to express his views.
64. In an email to the Claimant dated 20 March 2014, Mr Pendlebury said that the quashing of the certificate on a technical point left them back in the position of not knowing the extent of the lawful development. In the circumstances, it seemed reasonable to hold planning enforcement matters in abeyance pending the re-determination of the certificate of lawfulness to determine what was lawful development. In order to decide whether it was “expedient” to take enforcement proceedings, the Council had to establish what harm resulted from the unauthorised development, and in order to do that it needed to understand the ‘baseline’ of the lawful development.
65. In an email to the Claimant dated 15 May 2014, Mr Pendlebury said the matter was extremely complex and he was seeking the advice of the Council’s solicitor. He said CCL had requested an opportunity to provide further information, in response to matters raised in the judicial review claim, and to assist the Council in its redetermination. The timescale was 8 to 12 weeks. The Council considered this was a reasonable request. Mr Pendlebury said that the Council was *“acutely aware”* that the clock was still ticking in respect of enforcement proceedings for operational development and change of use, and would re-determine the application as quickly as *“this extremely complex matter allows”* and there would not be any unjustified delay. He referred to the continued monitoring of the Site by the Council; noted that there had been some recent developments e.g. storage bins and underground waste storage facility; informed the Claimant that CCL had agreed to apply for retrospective planning permission, but this could not proceed until the certificate of lawfulness had been re-determined.
66. In my view, the approach adopted by the Council was reasonable in all the circumstances, for the reasons given by Mr Pendlebury, and could not be characterised as unlawful.

The second certificate of lawful development

67. It took CCL longer than anticipated to finalise its application for a certificate. The noise impact assessment was dated 8 May 2014. The application was dated 30 June 2014, and it was only in respect of operations at the Site, not use. CCL decided to make a separate application in respect of use of the Site at a later stage. A substantial Environmental Statement (“ES”) was completed by September 2014. In view of the Claimant’s judicial review challenge to the first certificate on the grounds that no EIA assessment had been carried out, this was obviously a prudent step to take. Statutory declarations and a legal justification were submitted in September 2014. The Council was not in a position to validate the application until 15 September 2014. Given the scale of the work which CCL carried out, the time taken was understandable.
68. The Council conducted a statutory consultation procedure, and CCL submitted a response to points raised. The Claimant submitted further representations in March and April 2015.

69. The planning officer, Mr Gary Hancox, prepared a report for the Planning Committee on 22 June 2015. He noted that, though not legally required to do so, CCL had submitted an ES, and therefore the application had been treated and considered as if it was legally required under the EIA Regulations 2011. He concluded that the operational development would not give rise to likely significant environmental impacts. He accepted, on the balance of probabilities, the evidence submitted in support of the application and that the legal arguments in support of the separate areas of operational development were properly made out.
70. On 22 June 2016 the Planning Committee accepted the planning officer's recommendation and decided that the certificate of lawfulness should be granted in the terms sought.
71. Although this was a lengthy decision-making process, it was a fair reflection of the work reasonably required and the statutory procedures which had to be followed. In my view, there was no basis for saying that the Council should have changed course and commenced enforcement proceedings whilst this application was pending.
72. The certificate was granted on 8 July 2015 in respect of 44 buildings/structures.
73. The Council accepted that the development listed below had express planning permission:
- i) Original Hatchery Development and Bungalow: Pursuant to planning permission W.5075 granted in 1969 (Development 8).
 - ii) Switcher Room/Transformer: Pursuant to planning permission 3/78/0677 granted in 1978 (Development 18).
 - iii) The Lagoon: Pursuant to planning permission 3/85/1387 granted in 1985 (Development 25).
 - iv) Staff Toilets and Rest Room: Pursuant to planning permission 3/90/772/F granted in 1990 (Development 27).
 - v) Hatchery Extension: Pursuant to retrospective planning permission 3PL/2004/1425 granted in 2004 (Development 39).
74. The Council accepted that the developments listed below were permitted by virtue of permitted development rights that were in force at the time that such development took place:
- i) Under Class VI of the Town and Country Planning General Development Order 1963 ("the 1963 Order"):
 - a) Original Mill (Development 2).
 - b) the bag store extension built in 1968 (Development 6).
 - c) two finished product bins built in 1969 (Development 7).
 - d) the outside grinder and office built in 1970 (Developments 9 and 10).
 - e) the store and workshop built in 1971 (Development 11).
 - f) the carpenters workshop built in 1972 (Development 12).
 - g) the finished product bin built in 1972 (Development 13).
 - ii) Under Class VI of the Town and Country Planning General Development Order 1973 ("the 1973 Order"):

- a) two silos built in 1974 (Development 14).
 - b) the limestone bins in 1976 (Development 16).
 - iii) Under Class VI of The Town and Country Planning General Development Order 1977 ("the 1977 Order"):
 - a) the boiler room constructed in 1978 (Development 17).
 - b) the extension to the mill roof to house press 4 built in 1978 (Development 19).
 - c) the row of finished product bins constructed in 1979 (Development 20).
75. The Council accepted that the developments listed below were substantially completed over 4 years prior to the date of the application and thus was immune from enforcement action pursuant to section 171B(1) TCPA 1990:
- i) 1) Pre-1950: Clay Lump Offices constructed and converted in 1958.
 - ii) 4) 1967: Office and Weighbridge.
 - iii) 15) 1975/1976: Barn and Farm Workshop.
 - iv) 21) 1980: Amino Tanks and Compression House. Separate Wheat Silo and Bunded Tanks
 - v) 22) 1981: Original Intake Facility
 - vi) 23) 1982: Cladding of Finished Product Bins constructed in 1969
 - vii) 24) 1983: Cladding of Finished Product Bins constructed in 1972
 - viii) 26) 1987: Finished Product Bins (one row)
 - ix) 28) 1992: Removal of Finished Product Bins built in 1969 and 1972.
 - x) 29) 1995: Two of three original Silos replaced
 - xi) 30) 1996: Removal of Original Grinder House built in 1970
 - xii) 31) 1997: Intake 2 constructed
 - xiii) 32) 1997: Removal of Intake Building built in 1965
 - xiv) 33) 1998: Removal of the workshop built in 1972. Constructed housing of Press Line 4 and Finished Product Bins in place of removed building.
 - xv) 34) 1998: Wheat Cleaning Building
 - xvi) 35) 2000/2001: Final of three original Silos replaced
 - xvii) 36) 2002: New Self-Emptying Silo constructed
 - xviii) 37) 2003: Installation of Press Line 3 within exiting footprint of building.
 - xix) 38) 2003: Finished Product Bins constructed in 1979 and 1987 replaced and cladded
 - xx) 40) 2004: Demolition of the Intake Facility.

- xxi) 41) 2004: Demolition of 2 Silos constructed in 1974
 - xxii) 42) 2004: Intake 1 was built in place of the building dotted on the Plan
 - xxiii) 43) 2008: New Silo constructed.
 - xxiv) 44) 2008: Mixer extension to the west side of the Mill.
76. The Council accepted that the following developments did not constitute development, or alternatively were substantially completed over 4 years prior to the application:
- i) 1965: Portable storage bins.
 - ii) 1967: Portable storage bins.
 - iii) 2003: Installation of Press Line 3 within existing footprint of building.
77. Although the certificate was granted in respect of operations, not use, and so the Council was not required to consider use, it is evident from the planning officer's report for the meeting on 22 June 2015 that consideration was given to use. In particular:
- i) Evidence from the environmental health officers on noise from the mill and from HGVs.
 - ii) Evidence from the Environment Agency on the Environmental Permit which controlled noise and emissions.
 - iii) Objections from residents.
78. The ES considered the following key impacts in detail: employment and economy; transport; noise; drainage; ecology and cumulative impact. These were summarised in the planning officer's report. He said, at 5.0:
- “Use.
- Although this application is only concerned with the impacts of the operational development on the site, the submitted ES also assesses the likely impacts from the use of the site for that operational development. I have therefore carefully assessed the likely environmental impact in this regard as well, having taken into account relevant consultation responses and representations received.”
79. The lawfulness of the use had been considered by the Council after the Claimant's complaints in 2011 and continued in the period leading up to the time when the first certificate was issued on 23 July 2012. It was plainly under consideration by the Council thereafter, as the emails and reports demonstrate. In my view, it is quite unrealistic to suggest that the planning officers and members of the Planning Committee were not aware of the issues concerning the use of the Site when they were deciding whether or not to grant the second certificate, even though they were not making a formal decision as to the lawfulness of the use.
80. It was obvious from the schedule of the 44 structures and buildings that much of the development had occurred long ago. There was irrefutable evidence that the use had been ongoing for longer than the enforcement period of 10 years.
81. As to the allegation of recent significant expansion or intensification, the view reached by the Council's officers was summarised in the evidence of Mr Curtis:
- “37. From my various visits – and taking into account that it was apparent from the file and my knowledge of the Site that the operations had been ongoing for over 10 years – I

concluded that in my opinion, there was no immediate indication that the developments that had been constructed resulted in either a significant expansion or intensification of the Site, or significant harm arising out of such development, that would warrant enforcement action at that time.”

The Council’s letter of 13 August 2015

82. In the claim for judicial review, the decision challenged by the Claimant was the Council’s refusal to take enforcement action dated 13 August 2015, shortly after the second certificate was granted. This was a reference to the letter which the solicitor to the Council, Mr Horn, sent in response to the Claimant’s solicitor’s pre-action protocol letter. It was a statement of the Council’s position, rather than a decision. Mr Horn summarised the history and the steps taken by the Council to regularise the operational development and existing use at the Site. He explained that, in the light of the applications which CCL had made, and was still in the process of making, for certificates of lawful development and retrospective planning permission, the Council had concluded that it was not expedient to commence enforcement action. In my judgement, this letter did not disclose any error of law on the part of the Council. The Council was making a legitimate exercise of its discretion under section 172 TCPA 1990, which was consistent with the guidance given in Government policy about the use of alternatives to enforcement action where appropriate.

Mr Moys’ recent assessment

83. Mr Moys made a witness statement on behalf of the Council on 30 March 2016, reviewing the further evidence provided by Mr Armes and providing a current assessment of the need for enforcement action. He said:
- “10. I have also considered paragraphs 41 to 55 of Mr Armes’ statement where Mr Armes explains the development of the Site over the last 10 years.
11. I do not have any information which would lead me to doubt the information contained in this evidence, and on review of this evidence, I can endorse those conclusions made in paragraph 37 of [Christopher Curtis’s] Statement. I agree that there is no evidence before the Council that would indicate that these developments constructed in the last 10 years resulted in intensification, or material change of use of the Site.”
84. Mr Moys considered in some detail the individual developments undertaken since 2004 namely:
- i) Extension to hatchery (Development 39)
 - ii) Demolition and replacement of Intake Facility (Development 40 and 42)
 - iii) Demolition of two silos (Development 41)
 - iv) New Silo (Development 43)
 - v) Mixer extension (Development 44)
 - vi) Day Old Chick Shelter (Development 45)
 - vii) Grinder House Refurbishment (Development 46)
 - viii) Mechanical Weighbridge (Development 47)
 - ix) Loading Bay and 4 x Bulk Bins (Development 48)

- x) UKPN Electrical Steel Clad Shed (Development 49)
 - xi) Workshop Extension (Development 50)
 - xii) Switchgear Steel Shed (Development 51)
 - xiii) Underground Storage Tanks (Development 52)
85. In relation to all these developments, he concluded that they did not amount to a material change of use of the Site, either individually or collectively, as the evidence confirmed that the Site had been used for over 20 or 30 years as a feed mill and hatchery.
86. Mr Moys also gave details of the 6 applications which CCL made in March 2016, for certificates of lawfulness and retrospective planning permission at the Site which are being considered by the Council. He concluded that it was not expedient to take enforcement action at the Site whilst these applications were pending. However, if any developments were not regularised as a result of these applications, it remained the Council's intention to investigate further and consider whether at that stage it would be expedient to take enforcement action, having regard to the development plan and other material considerations.
87. In my judgement, the Council's decision not to take enforcement action whilst these further applications were being considered was a lawful and legitimate exercise of its discretion under section 172 TCPA 1990 and consistent with Government guidance.

Conclusions

88. In my judgement, the Claimant has failed to establish that the certificate of lawfulness granted by the Council on 8 July 2015 was unlawful. The Claimant has also failed to establish that the Council acted unlawfully in not taking enforcement action. Therefore the Claimant's application for judicial review is dismissed.