

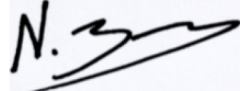




# ISLINGTON

Development Management Service  
Planning and Development Division  
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## REVOCATION REPORT

<b>Application number</b>	P2019/0535/COL
<b>Application type</b>	Certificate of Lawfulness (Existing)
<b>Site Address</b>	Unit A to D Bush Industrial Estate, Station Road, N19 5UN
<b>Previously Approved Certificate</b>	Application for Certificate of Lawfulness in connection with Existing B8 use - storage or distribution

<b>RECOMMENDATION</b>	Revocation of the Certificate of Lawful Use (Existing)	
<b>Report date</b>	Friday, 09 October 2020	
<b>Case officer signature</b>		<b>Date:</b> <b>09 October 2020</b>
<b>Report agreed</b>		<b>Date:</b> <b>09 October 2020</b>
<b>Authorising Officer</b>		<b>Date:</b> <b>13 October 2020</b>

## **Introduction**

1. A certificate of lawful use (the CLU) was granted in respect of the B8 user of Units A - D at the Bush Industrial Estate (the Premises) in April 2019 on an application made by Telereal Trillium on 15<sup>th</sup> February 2019 (the Application).
2. S.193(7) of the Town and Country Planning Act 1990 provides that:

A local planning authority may revoke a certificate under either of those sections if, on the application for a certificate –

  - (a) a statement was made or document used which was false in a material particular; or
  - (b) any material information was withheld.”
3. The Council is entitled to and expected to rely on the information provided in an application and hence the onus is on the Applicant to ensure it is accurate and complete. S.193(7) is to protect against the position where information is false in a material particular or material information is withheld. The fact that the Council in assessing the Application had not identified that the Application was false in a material particular or any material information was withheld does not render s.193(7) inapplicable or make it inappropriate for the Council to rely on it. Indeed s.193(7) is to address a situation where the falsity of the statement or the withholding of material information is not identified until after the grant of the CLU.
4. The focus of this provision is on the Application and material provided with it. To be “false” under (a), the statement simply has to be wrong and not according with the facts – it does not have to be *deliberately* wrong. It is no part of the test under (b) that the material was *deliberately* withheld in order to mislead or to create a false understanding.
5. Matters relating to the nature, periods and continuity of user were material to the decision as to whether the grounds for the CLU were made out and matters relevant to the identification of the planning unit were material in determining whether the statutory tests were met and in respect of what areas.
6. In April 2020, a group called Concerned Residents of Tufnell Park (CRTP) provided a pack of material which it said demonstrated that the CLU should be revoked under s.193(7). Having considered the material provided in detail and considered the relevant legal principles, the Council wrote to Telereal Trillium and the current lessees of the Premises (Ocado) on 1<sup>st</sup> June 2020 pursuant to art 39(15) of the Town and Country Planning (Development Management Procedure)(England) Order 2015 (DMPO). Having considered the responses of the Council, set out its preliminary view and gave Telereal Trillium and Ocado a further opportunity to respond. This report is written in the light of the totality of the material.

7. Officers are satisfied that on most of the matters raised in the Council's 1<sup>st</sup> June 2020 article 39(15) letter the grounds for revocation are made out, that statements were made on the application which were false in a material particular and that material information has been withheld.
8. The Council has a discretion as to whether to revoke in such circumstances. Officers are satisfied that it should do so. The statutory scheme envisages and relies on correct and complete material information being provided. The matters addressed below are directly material to whether the grounds for the grant of a CLU were made out. Had the false statements not been made and/or the material information not withheld the Council could have come to a different decision and/or would have been alerted to the need to carry out further investigations in particular as to the planning unit. Telereal Trillium has secured a benefit to which it was not lawfully entitled on an application which contained false information and on which material information was withheld. .

### **The Application**

9. The Application was required to answer the questions on the prescribed form: Art 39(1) of the DMPO. For breaches of condition, the questions are formulated to meet the requirements of *Ellis v. Secretary of State* [2009] EWHC 634 (Admin) [2010] 1 P&CR 21; *Nicholson v. Secretary of State* (1998) 76 P&CR 191 namely that the use had to be subsisting at the date of the application and to have been continuous for ten years.
10. The Application: The Application stated that it was made on the basis of a breach of condition (box 4) starting more than 10 years before the date of the application (box 6) in 1992 (box 7). Further in answer to the question - "In the case of an existing use or activity in breach of condition has there been any interruption?" the answer given was "No" (Box 7). A declaration that "we confirm that, to the best of my/our knowledge, any facts stated are true and accurate" was given (box 12).
11. The Covering Letter: The Application referred to and incorporated the "supporting covering letter for further information": box 6. It is evident that the letter was proceeding on the basis that the legal test was whether there had been a continuous period of 10 years user in breach of condition at some time in the past which had not been subsequently abandoned or superseded. The detailed covering letter appended plans, photos, a statutory declaration and a summary of the planning history:
  - a. the letter proceeded on the basis that there was a single planning unit. The letter did not mention the lack of interconnection between units B & C;
  - b. the supporting evidence as to use was said to be "precise and robust" such that in the absence of contradictory evidence it should be relied on;

- c. the letter referred to the 2011 tennis court applications as noting the “underused nature of the surrounding B8 units” and that “these are not being used to capacity”. It did not refer to the fact that Telereal Trillium had stated in that application that Units C&D were unused at that time and had been marketed since 2006;
  - d. the letter went on to state that “during the period from 1992 to 2013... the building was fully operational as a warehousing/storage depot” primarily used as stores. Photographs of the use were provided. No mention was made of the fact that units C&D were not used at all through much of that period or that they did not interconnect with units A & B. The photos of empty units C&D from the 2011 application were omitted;
  - e. the letter then refers to a new lease being granted to Royal Mail when BT vacated in December 2013/January 2014. The letter refers to the lease ending in 2017. No mention is made that Royal Mail ceased to use the Premises, at the latest, in 2015; and
  - f. no mention is made of the unlawful occupation by trespassers of the vacant units in 2017.
12. The Statutory Declaration: The Application was accompanied by a statutory declaration of Damian Mark Molony “for the purposes of confirming the existing use of [the Premises]”. He confirmed that he was able to make the declaration from his own knowledge and declared that it was accurate and complete (para 1). He disposed of the information set out “from my own knowledge of the use of these buildings and the site generally.”
13. As to the planning unit, the statutory declaration stated that the Site comprised “four interlinked warehouses”. The presence or absence of interlinks was correctly recognised as material. It went to the existence of a single planning unit and thus to: (1) the planning unit in respect of which a certificate could be granted; and/or (2) the evidence required for each Unit so as to satisfy the legal test for a certificate. The four units were not interlinked – units A and B and units C and D were interlinked with interlinking doors but there was no interlink between units B and C which were physically separate and had in fact been separately marketed.
14. At paragraph 8, he stated:
- “I confirm that, since at least 1992, the whole of the Site was in use as a warehousing/storage (Class B8) depot with ancillary offices and, as far as I am aware, this use has been continuous throughout”.***
15. He appended the photographs which were said to be “typical”. He did not exhibit the photographs from 2011 showing the empty units.

Application of s.193(7)

16. The Application contains statements that were false in a material particular and/or material information was withheld.

17. As to continuity of user, the correct material facts were that:

- a. at least Units C&D were unused for B8 or any use for prolonged periods during BT's lease (which ran from 2001 to 2013);
- b. to Telereal Trillium's knowledge they were unused in 2011 and, being surplus to requirements, had been marketed by BT as a separate unit from 2006 (see 2011 Application);
- c. even if Royal Mail had ever occupied the Premises under the Lease, they had vacated Units A – D by 2015; and
- d. there has been no use of any of the buildings post – 2015.

18. Thus:

- a. paragraph 8 of the statutory declaration quoted above was false – “since at least 1992 the whole of the site” was not in use as a warehousing/storage depot and/or the use had not been “continuous throughout”;
- b. alternatively if reliance is placed on the words “so far as I am aware” in paragraph 8, material information was withheld in that the information set out in paragraph 15 was known to Telereal Trillium and was withheld (and/or the fact that Mr Maloney who was professing to give first hand evidence had not visited the site in during BT's occupation and so could not attest to the continuity of use during this period was withheld);
- c. also in paragraph 8, the reference to typical photographs was false or material information was withheld – the photographs were not typical of the use of units C & D in the period and/or the 2011 photographs were material and were withheld;
- d. the covering letter's reference to the 2011 Application was false and/or material information was withheld. This was not a situation where the units were underused or not being used to capacity – on Telereal Trillium's own application, they had been vacant and marketed since 2006;
- e. the covering letter's assertion that the “building was fully operational” during the period to 2013 was false for the reasons given at 17a – b above;
- f. box 7 on the Application was false – there had been interruptions of the B8 use and the use was not existing; alternatively information material to whether there had been such interruptions was withheld.

19. As to the planning unit, interlinks between the units was relevant to the question as to whether Units A – D were a single unit and thus the evidence required to establish entitlement to the CLU. The statement in paragraph 4 of the Statutory Declaration was false. Units B & C were not interlinked. Alternatively, if “interlinked” can properly be understood as referring to something other than

direct access between the units then necessarily material information as to the lack of any such direct access was withheld.

20. It is therefore concluded that the statutory test in s.193(7) is met. Officers consider that the Council should exercise its discretion to revoke the CLU.

21. It is appropriate to address some further matters raised by Ocado.

### **The wrong legal test**

22. Ocado contends through its solicitors that the correct legal test was whether there had been a 10 year period of continuous user in breach of the condition at any point in the past and if so whether that lawful use had then been abandoned or superseded. That is not the correct legal test. *Ellis* addresses all the arguments raised by Ocado and finds that the correct test in circumstances such as this is as in *Nicholson*. It appears that the officer determining the application fell into the same error as Ocado and Telereal Trillium.

23. It is said that on that (incorrect) test, the statements were not false in a *material* particular or that *material* information was not withheld because the lack of continuity after 2002 could not affect the entitlement to, or grant of, the CLU. On the correct legal test (*Ellis*), the information was material. The information does not become immaterial because the applicant (and then the officer) used the wrong legal test. In any event, the Application form makes clear what is material and that the focus is on interruptions of the existing use. In any event, even the application of the wrong legal test, still requires an accurate factual understanding of the use over time. The statements which were false in a material particular and the withholding of material information go to that issue too.

24. It is said that the statements have to be understood in the light of the (wrong legal) test which was being applied and that, in that context, "interruption" and "continuous" mean only no abandonment or supervening use since the B8 use became lawful. It is not accepted that unambiguous statements of fact can have different factual meanings dependent on context. In any event, it is considered that: (1) the phrase in paragraph 8 of the statutory declaration including "this use has been continuous throughout"; and (2) Box 7 of the Application are clear. These are assertions that the use has been continuous and there has been no interruption. Both assertions were false.

25. Ocado contends that given the application was clear that the active use had ceased by 2017, "no statement was made that the active occupation has been uninterrupted". That is not the legal test under s.193(7). That sub-section is not focused on statements which were not made but on false statements which were. Further, that sub-section is not concerned with the conclusion from the facts but with the facts asserted that go towards the ultimate conclusion.

26. It is then said that it is not possible to withhold information from a person who already has it – the point being that as Islington could discover the facts from its own archives, that means the information is not withheld. The onus is on the applicant to provide correct not false information and not to withhold material information. The Application and the statutory scheme proceeds on the basis that the information in the application is not false and that material information will not be withheld. It is no defence to a s.193(7) revocation to say that the Council could or should have realized that the information was false or material information was withheld and correct it before grant.
27. Reliance is placed on the delegated report para 7 – where it is said that “The local planning authority holds no information to make the applicant’s account of events less than probably [sic]...”. ***That statement was wrong. It should have said that the officer was not aware of any information held that was wrong. The statement was not made following a detailed research of all the planning history – reliance was properly placed on the applicant’s summary of that planning history.*** In any event, Ocado and the officer were applying the wrong legal test. The facts referred to in para 17ff above were material to the application – false statements were made and material information withheld.

### **The planning unit**

28. Identification of the correct planning unit is key to determining whether the evidence justifies a CLU and over what area. Telereal Trillium and Ocado maintain that there was a single planning unit. On that basis they contend that the lack of use of areas C&D is not relevant or material because the single planning unit was in fact used for B8 even though parts of it were not. Indeed, Mr Molony expressly relies on this argument to explain why information on use of C&D was “immaterial” (para 12 of his second statutory declaration). Mr Molony relied on the four “interlinking” warehouses as part of his single planning unit approach. There was no interlinking between units B & C. They were self-contained and capable of separate occupation (the only issue being the single electricity connection). The fact that the yard was fenced and secured does not detract from that. Whilst it is not necessary at this stage for the Council to reach a concluded view on the planning unit, the false assertion of “interlinking” is material to that exercise as is the lack of use and separate marketing of units C&D.

### **Conclusion**

29. For the reasons set out above, officers consider that statements were made on the application which were false in a material particular and that material information has been withheld.
30. It is therefore recommended that the certificate is revoked under S.193(7) of the Town and Country Planning Act 1990.