

<b>Committee Date</b>		
<b>Address</b>	Land At Junction With South Eden Park Road And Bucknall Way Beckenham	
<b>Application Number</b>	20/04446/ELUD	<b>Officer</b> - Susanna Stevenson
<b>Ward</b>	Kelsey And Eden Park	
<b>Proposal</b>	Use of the land circled in red on drawing 15124 S101 B for the storage of cars or for the parking of cars or as a car park in association with car dealerships (LAWFUL DEVELOPMENT CERTIFICATE - EXISTING).	
<b>Applicant</b>	<b>Agent</b>	
Mr J Dayani 434 Croydon Road Beckenham BR3 4EP	Mr John Escott Downe House 303 High Street Orpington BR6 0NN United Kingdom	
<b>Reason for referral to committee</b>	Call-In	<b>Councillor call in</b> Yes

<b>RECOMMENDATION</b>	RESOLVE TO CONTEST APPEAL
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<p>KEY DESIGNATIONS</p> <p>Conservation Area: Park Langley Biggin Hill Safeguarding Area London City Airport Safeguarding Smoke Control SCA 21</p> <p>Urban Open Space</p>
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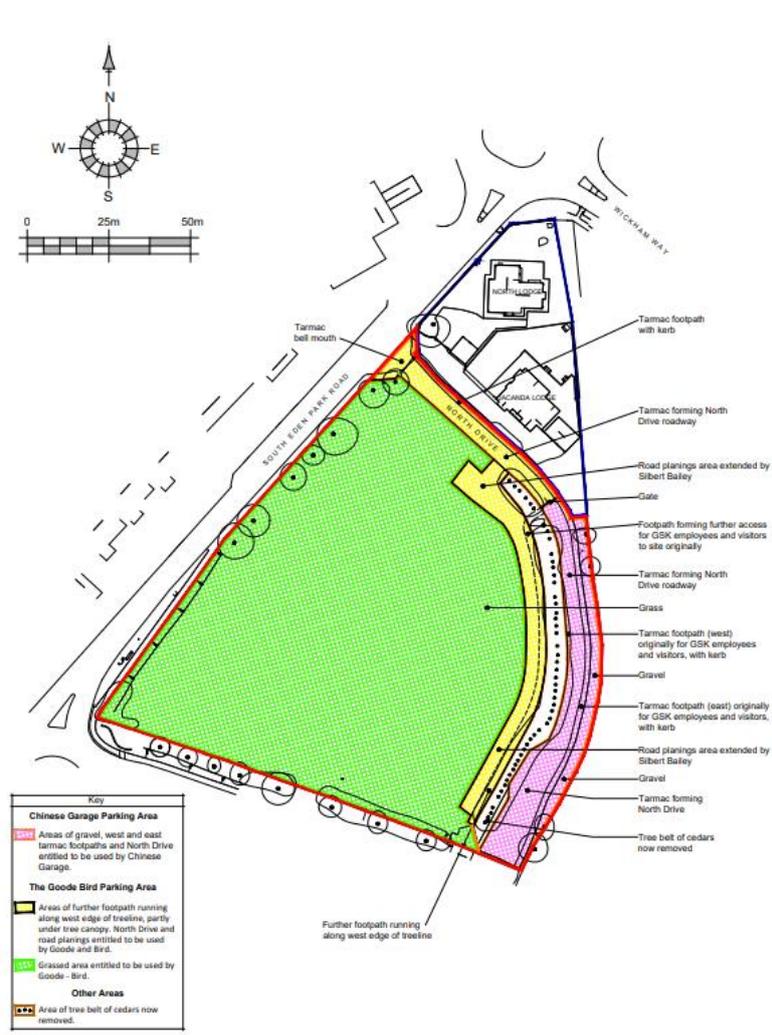
<b>Representation summary</b>	37 letters were sent to neighbouring residents on 15 <sup>th</sup> December 2020.	
Total number of responses	3	
Number in support	0	
Number of objections	3	

## 1. SUMMARY OF KEY REASONS FOR RECOMMENDATION

- The previous committee report associated with the application site and the Lawful Development Certificate application submitted under reference 18/00103/ELUD is attached as an addendum item for this report.
- In February 2020 Members resolved to grant a Lawful Development Certificate for the application site, with modification to the LDC plan to show the area shown coloured yellow, red and white on submitted drawing 15124 S103 J.
- This application replicates the previous application. The previous evidence is reiterated. The difference between the previous application and this current application is the inclusion of Counsel opinion from David Elvin Q.C. that concludes that the LBB did not properly apply the law to the facts on the LDC application under reference 18/00103/ELUD.
- The applicants contend that in granting the Certificate with modification under reference 18/00103/ELUD the Council erred in law, and that the Council should have Certified as lawful the use of the whole of the application site which is edged in red on the submitted drawing for the storage of cars or as a car park in association with car dealerships.
- The Council has sought legal advice on the application, with reference to the Counsel opinion provided by the applicant, to inform whether the previous decision was sound and that the modification of the LDC red line area under 18/00103/ELUD was appropriate in the context of planning law.
- It is considered, on the balance of probabilities, taking into account all evidence provided by the applicant, and all other evidence available to the Council, that the assessment under reference 18/00103/ELUD remains sound.
- The applicants have lodged an appeal against the non-determination of the application. If that appeal had not been lodged, the recommendation of this report would have been again that Members grant the Certificate with the modification of the LDC plan to show the area coloured yellow, red and white on drawing 15124

S103 J. The appellant's appeal submission to date references the decision, report and modified site plan associated with the previous application.

- A concurrent appeal has been lodged regarding application 19/01543/RECON1. Members resolved at the Development Control Committee meeting held on 20<sup>th</sup> May 2021 to contest the appeal. This appeal relates to the proposed removal of condition 3 (viability review mechanisms) of the permission under 19/01543/FULL1.

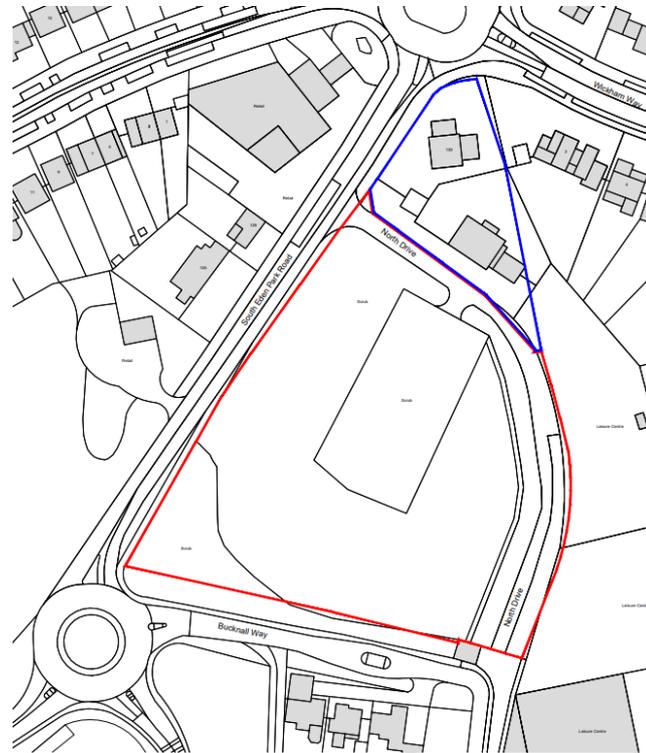


*Drawing 15124 S103 J submitted with previous application*

## 2. LOCATION

2.1 The application site is wedge-shaped. It lies to the north of the residential development at Bucknall Way. It is bounded to the north east and east by residential dwellings fronting Wickham Way. To the north west is South Eden Park Road and the site terminates in a point at the roundabout junction of Bucknall Way and South Eden Park Road.

2.2 The site was, when the first application for a Lawful Development Certificate was submitted, generally grassed/overgrown with vegetation. The red line site includes the roadway of North Drive which leads from South Eden Park Road to Bucknall Way, following the curved outer edge of the red line site.



2.3 The site is designated as Urban Open Space.



2.3 Some preparatory works associated with the site's residential development (see Planning History section) have been undertaken as seen in the aerial image above

involving the removal of the grassed area between the hardstanding parking area and the South Eden Park Road and Bucknall Way boundaries.

- 2.4 Historically, the red line site as a whole formed part of the former medical research facility/laboratories. At some point it was severed. The statement of common ground in respect of the recent planning appeals associated with the residential development of the site referred to the site as being "fenced off and used only intermittently for commercial purposes since its disposal in 1999 by the Council to the applicants." The private access drive was referred to in the SoCG as forming originally the main entrance into the Glaxo Wellcome Research Laboratories site.

### 3. PROPOSAL

- 3.1 The current application replicates the previous application granted a Lawful Development Certificate (with modification) in 2020 with the exception that this application is supported by the Counsel opinion of David Elvin Q.C.
- 3.2 The Council again consulted neighbouring residents in relation to their knowledge of the application site, and the comments received are summarised in section 5 below.
- 3.3 The application relates solely to the lawfulness of the use of the site.
- 3.4 David Elvin Q.C. was asked to advise on what the planning unit is in this case and summarise the principles in *Burdle v. Secretary of State [1972]* and any other relevant authorities in concluding on this issue.
- 3.5 The opinion says that "there was no reference to Bridge J's "useful working rule in *Burdle* at p. 1213" and says that the previous report confused physically separate and distinct areas with functionality, saying that the officer's report wrongly applied the *Burdle* judgement.
- 3.6 The "useful working rule" referred to is quoted in para. 26(4) of the opinion:  
"As Bridge J pointed out "a useful working rule" is to assume that the unit of occupation is the appropriate planning unit, unless and until some smaller unit can be recognised as the site of activities which amount in substance to a separate use both physically and functionally."
- 3.7 It is said that the following appeared from the officer's report to be uncontroversial:
- (1) The site is in single ownership and occupation;
  - (2) There are no significant physical barriers on the land still less ones that divide the area in respect of which the CLEUD was granted from the remainder of the Land and "which are occupied for substantially different and unrelated purposes." [reference is made to the contrast therefore with the separate shop units in the shopping centre in *Church Commissioners for England v Secretary*

*of State* (1996) where there was both physical structure and separate occupation.

(3) In general, the cars have not parked on the grassed area

(4) The area covered by the CLEUD [LDC] is not restricted to the driveway

- 3.8 The opinion says that the officer's report in the previous application focussed too much on the use of the land as opposed to properly analysing the planning unit within which that use is determined. It says that the report did not properly acknowledge that other than the hardstanding used for the road, there is no physical separation other than surfacing, which provides no sensible barrier. Within, for example, residential curtilages or industrial units, there may be driveways, roads or paths which would not as a consequence of their surfacing be considered as providing a physically separate and distinct area and separate planning unit.
- 3.9 In the officer's report, there was reference to the comments of Planning Inspectorate on the characteristics of the site/land, but it is said in the Counsel opinion that these comments and the Inspector's assessments did concern the Planning Unit issue.
- 3.10 The opinion states that the officer's report did not approach the issue of analysing the facts by referring to the unit of occupation first, before considering whether there is a good reason for not using the unit of occupation, and in the opinion it is said that this was a notable failure to approach the issue from the perspective of Bridge J's "working rule."
- 3.11 The opinion notes that the roadway in question is edged with grass and the open part of the land is a continuation of this. It is said that the practice may not have been to park cars on the open area does not mean that the physical division is of significance nor that it could reasonably be said to be an area "occupied for substantially different and unrelated purposes." The opinion refers to the officer's report acknowledgement of wider overspill from time to time:

*"From time to time there may have been some degree of overspill from the hardstanding area formed of and adjacent to the original access drive, but it does not follow that where there was overspill this would have led to vehicles traversing the overgrown grassed area to the outer margins of the red line site nor that this has operated regularly or permanently such that would establish the use of the grassed area for the parking of motor vehicles"*

and says that this demonstrates that there is not a physically separate and distinct area.

- 3.12 It is said with regards to the majority of the site (the grassed area) that there appears to be no substantially unrelated and differing purpose(s) for its occupation and that there is no evidence that would lead to the rational conclusion that it is "occupied for a substantially different an unrelated purpose."
- 3.13 The opinion concludes that if the Burdle judgment is applied properly to the facts there is a strong case to maintain that the planning unit is the whole of the land and

not merely the area indicated on the plan attached to the previous Lawful Development Certificate.



*Image of red line plan issued with LDC 18/00103/ELUD*

#### **4. RELEVANT PLANNING HISTORY**

- 4.1 The site has a long planning history relating to the former use of the site as part of the wider GSK/Wellcome medical research laboratories (now defunct). No planning permission granting an alternative use of the site has been granted since 1999 save for the residential development referred to below, which has not to date been implemented.
- 4.2 The recent relevant planning history relating to the specific application site is summarised as follows:

APP/G5180/C/06/2026981 (Land at Jacanda Lodge, North Drive, Beckenham, BR3 3XQ). (Council reference H(DC)TCB/DC/05/01014).

Appeal against enforcement notice ALLOWED and notice quashed.

16/02613/OUT

Residential development comprising of 105 units with a mixture of 4 bedroom houses and one, two and three bedroom apartments together with concierges

office and associated basement car parking (OUTLINE APPLICATION)  
REFUSED. ALLOWED AT APPEAL

17/00757/OUT

Residential development comprising 15 four storey townhouses and 52 apartments in three and four storey blocks to provide a total of 67 residential units together with concierges office and basement car parking (OUTLINE APPLICATION).  
REFUSED. ALLOWED AT APPEAL

18/04519/DET

Details of appearance, landscaping and scale pursuant to outline permission DC/16/02613/OUT allowed at appeal on 22.03.2018 for the residential development comprising of 105 units with a mixture of 4 bedroom houses and one, two and three bedroom apartments together with concierges office and associated basement car parking.  
APPROVED

19/01543/FULL1

Residential development comprising erection of 6 x four storey buildings consisting of 10 four bedroom houses and 133 x one, two and three bedroom apartments together with concierges office. Construction of basement car park with 204 spaces. Central landscaped area with 10 visitor spaces cycle parking for 286 and refuse stores.  
PERMISSION SUBJECT TO LEGAL AGREEMENT

19/01543/RECON

Application under Section 73 of the Town and Country Planning Act 1990 to remove condition 3 (scheme to be submitted for the provision of affordable housing) of permission ref. 19/01543/FULL1 for residential development comprising erection of 6 x four storey buildings consisting of 10 four bedroom houses and 133 x one, two and three bedroom apartments together with concierges office. Construction of basement car park with 204 spaces. Central landscaped area with 10 visitor spaces cycle parking for 286 and refuse stores.  
APPROVED

19/01543/RECON1

Application under Section 73 of the Town and Country Planning Act 1990 to remove condition 3 (requirement to enter into S106 planning obligation to secure viability review mechanisms) of permission ref.19/01543/RECON for residential development comprising erection of 6 x four storey buildings consisting of 10 four bedroom houses and 133 x one, two and three bedroom apartments together with concierges office. Construction of basement car park with 204 spaces. Central landscaped area with 10 visitor spaces cycle parking for 286 and refuse stores.  
MEMBERS RESOLVED TO CONTEST APPEAL (20/5/21)

## **5. CONSULTATION SUMMARY**

**A) Statutory** **NONE**

**B) Local Groups** **NONE**

### **C) Adjoining Occupiers**

Comments received objecting to the change of use are available on file. Where information has been provided regarding the use of the site, it is summarised below:

- For 4 years the whole of the land adjacent to No. 2 Wickham Way has had cars parked on it – can be seen from that property.
- Dwelling in Hampstead Mews purchased in March 2011 and at that time there were only a few cars parking on the ring road only. It is wrong to suggest that the land has been used as a car park for more than 4 years, has been an increase in activity over the past few years including an increase in cars being parked, dumping of waste and burning of fires.
- Since 2010 they have been parking old cars and vans on North Drive only. Since 2015 they have been parking JCBs, old cars, vans and burning rubbish
- Have lived in Bucknall Way for nearly 20 years and only in last couple of years have significant numbers of cars been parked on the area. True extent of the extension of storage has become apparent with recent removal of trees. Was not until Tennis Club extension that the number of cars increased to any large degree. Complaints to the occupant regarding rubbish being burned have been responded to that it is only garden rubbish – if only garden rubbish can not be a commercial site
- Number of cars have increased within last 2 years with North Drive and the hard stand area now appearing full, resulting with JCBs and additional cars being located on the grass and building rubbish deposited on the site
- Significant increase in cars being parked on the land in the last few months
- As previous comments on previous application, there are almost always quite a few cars parked on North Drive, but not seen cars parked on the grass land.
- There have been breaks in the use followed by a significant recent increase

## **6. POLICIES AND GUIDANCE**

- 6.1 This application seeks a certificate to confirm that the existing use of the land or activity would be lawful for planning purposes under section 191 of the Town and Country Planning Act 1990.
- 6.2 The certificate shall specify the land to which it relates, describe the use/operations/other matter in question, give the reason for determining the use etc. as lawful and specify the date of application.
- 6.3 In applying for a certificate of lawful development for an existing use, there is a need to demonstrate that, on the balance of probability, the use/development as described has subsisted for at least 10 years.

- 6.4 The applicant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the local planning authority has no evidence of their own, or from other, to contract or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's own evidence alone is sufficiently precise and unambiguous to justify the grant of the certificate "on the balance of probability."
- 6.5 It is for the applicant to demonstrate that, on the balance of probabilities, the material change of use has existing for a period in excess of 10 years beginning with the date of the breach, without any enforcement action being taken and continued actively throughout the following 10 year period. There can be no 'dormant' periods in the 10 year period. The applicant must show when the change of use first occurred and demonstrate that it continued actively throughout the relevant period. While short periods of inactivity can be regarded as part of a continuing use, longer periods cannot.
- 6.6 The application has been submitted with reference to case law and this current application is supported by Counsel opinion of David Elvin Q.C. instructed to advise the owners of the land as listed above.

## **7. ASSESSMENT**

- 7.1 The assessment of the facts of the case as submitted under 18/00103/ELUD can be read within the attached report to Members of the Plans Sub-Committee meeting held on 20<sup>th</sup> February 2020. It is necessary to read both this report and the previous report together in order to assist the members with their consideration of the documented evidence.
- 7.2 As previously noted and summarised in preceding sections on this report, the applicant has sought instruction of a QC to advise on the lawfulness of the case, along with commentary on the officer's report on the previous application.
- 7.3 Other than this Counsel opinion, the application is as previously submitted. The only other difference being the passage of time and the on-going current discussion over benchmark land value in the context of application 19/01543/RECON1 (appeal lodged) which is an application under S73 for the removal of condition 3 of that permission which required that the applicant enter into S106 planning obligation to secure viability review mechanisms in the development of the application site for the erection of 143 homes.
- 7.4 The criticisms made of the previous report (18/00103/ELUD) are not accepted. Contrary to what is argued in the applicant's opinion, the report adopted the correct approach to the question of the planning unit consistent with the Burdle case as applied to the facts (including Bridge J's "working rule"). As the Burdle case stresses, it is one of fact and degree for the Local Planning Authority, as is the question of material change of use. There was no undue focus on uses, nor any confusion between uses and functionality, and the judgments reached are sensibly based on the evidence. In short, and as fully detailed in the previous report, while the land as a whole may be in terms of ownership a single unit of occupation, on the basis of all the information provided it is firstly considered that there was during

the relevant period physical separation resulting from the ground surface between the component areas and functional separation in terms of actual uses within the site. Secondly, it is considered that while Mr Goode and Mr Bird may have been permitted by the landowner to use the grassed area for the storage/parking of motor vehicles, the evidence provided is inconclusive and does not support the conclusion that they have used the red line area consistently or more often than not as such for the relevant period. The previous report concluded that the facts fall within the third category in Burdle, the open grassed area being in a substantially different and unrelated use such that the hard surfaced area is to be regarded as the planning unit for the lawful use certificate assessment. That conclusion remains.

7.5 On that basis, having considered the application, it is considered that the previous conclusion remains sound i.e. that on the basis of the information provided within the application, the Council's own records and information provided by neighbouring residents, the planning history and images of the site, the Local Planning Authority is persuaded that the use of the hardstanding areas and a small adjacent part of the grassed area for the storage of vehicles has gone on for a period of at least 10 years is maintained, and that a CLEUD could be granted to this effect.

## 8. CONCLUSION

8.1 The submitted drawing 15124 S103 J defines different parts of the site, annotated to indicate the separate parking areas (Goode/Bird and Chinese Garage).



Extract from 15124 S103 J – whole image available on file (in colour)

- 8.2 However, it is not considered on the basis of the application submission and all other evidence that on the balance of probabilities the use has extended across the entirety of the site.
- 8.3 The application is subject to an appeal on the ground of non-determination. In view of the above and in the absence of the appeal it would have been recommended that the lawful development certificate be granted with modification as before, under reference 18/00103/ELUD. As an appeal has been submitted which disputes the Council's assessment of the extent of the site within which the use is considered to be lawful, it is now recommended that Members resolve to contest the appeal, with the content of the "7.0 Assessment" section within this report, and the assessment within the report on 18/00103/ELUD, providing the Council's grounds to contest the appeal.

### **RECOMMENDATION: RESOLVE TO CONTEST APPEAL**

On the basis of the application submission and all other evidence, it is not considered on the balance of probabilities that the entirety of the land circled in red on drawing 15124 S101 B has been used for the storage of cars or for the parking of cars or as a car park in association with car dealerships.