



PLANNING COMMITTEE

10th April 2014

REPORT OF HEAD OF PLANNING AND BUILDING CONTROL

Brush Garage 86 Lichfield Road, Shelfield, Walsall, WS4 1PY

1.0 PURPOSE OF REPORT

Following the Motion of the Chairman to allow Members to consider the enforcement matters in relation to Brush Garage.

2.0 RECOMMENDATIONS

- 2.1 That, in considering whether to take enforcement action, there has been no material change of circumstances to justify a different outcome to that previously resolved by the Committee: (i) at the committee meeting of 29th March 2012 *"...that there should be no enforcement action as Members felt there had been no significant changes to the fabric of the building in relation to height, width or massing, subject to the applicant entering into a section 106 agreement..."*; and (ii) at the Committee meeting on 26th July 2012 to stand by the decision of 29th March 2012. In all the circumstances, the issue of an enforcement notice to require the demolition of the building on the Brush Garage site would not be expedient.

3.0 FINANCIAL IMPLICATIONS

An appeal against an enforcement notice could be subject to an application for a full or partial award of the appellant's costs in making an appeal if it was considered that the Council had acted unreasonably. A judicial review of the decision to issue an enforcement notice could also result in significant cost awards against the council if the challenge was successful. This is considered in more detail in paragraphs [20.5-20.8].

4.0 POLICY IMPLICATIONS

The following planning policies are relevant in this case:

National Planning Policy Framework (NPPF)

The NPPF sets out the Government's position on the role of the planning system in both plan-making and decision-taking. It states that the purpose of the planning system is to contribute to the achievement of sustainable development, in economic, social and environmental terms, and it emphasises a *"presumption in favour of sustainable development"*.

All the **core planning principles** have been reviewed and those relevant in this case are:

- Proactively drive and support sustainable economic development to deliver the homes, businesses and industrial units, infrastructure and thriving local places the country needs.
- Always seek to secure high quality design and a good standard of amenity for all existing and future occupants of land and buildings.
- Take account of the different roles and character of different areas, promoting the vitality of our main urban areas.
- Encourage the effective use of land by reusing land that has previously been developed.

Key provisions of the NPPF relevant in this case:

1. Delivering sustainable development

19 Planning should encourage and not act as an impediment to sustainable growth.

21 Investment in business should not be over-burdened by the combined requirements of planning policy expectations.

7. Requiring good design

58 Developments should function well and add to the overall quality of the area. Establish a strong sense of place using streetscapes and buildings to create attractive and comfortable places to live, work and visit. Optimise the potential of the site to accommodate development. Respond to local character and history, and reflect the identity of local surroundings and materials. Create safe and accessible environments that are visually attractive as a result of good architecture.

61 Securing high quality design goes beyond aesthetic considerations. Decisions should address the connections between people and places and the integration of the new development into the built environment,

64 Permission should be refused for development of poor design that fails to take the opportunities available for improving the character and quality of an area and the way it functions.

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.

The Development Plan

Planning law requires that planning permission must be determined in accordance with the development plan unless material considerations indicate otherwise. The NPPF is a material consideration in planning decisions but recognises that what it terms 'Local Plan' policies should not be considered out-of-date simply because they were adopted prior to the publication of the framework.

The Black Country Core Strategy (BCCS)

http://www.walsall.gov.uk/index/environment/planning/local_development_framework/ldf_core_strategy.htm

This was adopted under the current Local Development Framework system, and the NPPF says that for 12 months from the publication of the national framework "decision-takers may continue to give full weight to relevant policies. However, it

is more than 12 months since the NPPF was published in March 2012. Now (as with the saved policies of Walsall's UDP) the NPPF advises that "... *due weight should be given to relevant policies ... according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given).*" To consider the conformity of the BCCS with the NPPF the four Black Country councils have completed a 'Compatibility Self-Assessment Checklist' (published by the Planning Advisory Service) and have discussed the results with a Planning Inspector. Whilst there is no formal mechanism to certify that the BCCS is consistent with the NPPF the discussions led officers to the conclusion that the exercise identified no issues that would conflict with the NPPF or require a review of the BCCS in terms of conformity. The results of this assessment are to be published on the BCCS and Council websites and it is planned to report to the Council's Cabinet to confirm this view. In the absence of evidence to the contrary it is considered that the BCCS policies should be given full weight

The relevant key policies are:

2a: Seeks to create a network of cohesive, healthy and prosperous communities across the Black Country, deliver high quality distinctive places which respect the diversity of the Black Country natural and built environment and attract new employment opportunities.

CPS4: The design of spaces and buildings will be influenced by their context and seek to enhance the unique attributes the area offers.

ENV2: Development proposals will be required to preserve and, where appropriate, enhance local character.

ENV3: Provision of a high quality network of streets, buildings and spaces

EMP1-4: Seeks to secure, safeguard and provide appropriate levels of employment land to aid sustainable economic growth

It is considered in this case that the relevant provisions of the BCCS can be given full weight.

Walsall's Unitary Development Plan (UDP)

www.walsall.gov.uk/index/environment/planning/unitary_development_plan.htm

Policies that have been saved and not replaced by the BCCS remain part of the development plan. However, in such cases the NPPF says "*due weight should be given to relevant policies in existing plans according to their degree of consistency with this framework (the closer the policies in the plan to the policies in the Framework, the greater the weight that may be given)*".

The relevant policies are:

GP2 Expects all development to make a positive contribution to the quality of the environment and will not permit development which would have an unacceptable adverse impact upon the environment: i) Visual appearance, vi) Overlooking, loss of privacy and the effect of daylight and sunlight.

3.6 Development schemes should, as far as possible, help to improve the environment of the borough.

ENV32: Poorly designed development which fails to properly take account of the context or surroundings will not be permitted.

ENV35: The design of frontage to shops and other commercial premises should be appropriate to their setting.

4.4: Core employment uses are defined as industry and distribution in Classes B1b, B1c, B2 and B8 of the Use Classes Order.

JP7: Other Employment Areas: Uses that will normally be permitted in these areas include: i. Core Employment Uses

It is considered that the relevant provisions of Walsall's saved UDP policies are consistent with the NPPF.

Supplementary Planning Documents (SPD)

On the basis that relevant UDP policies are consistent with NPPF, the related SPD(s) will also be consistent provided they are applied in a manner consistent with NPPF policy. The relevant SPD's are:

Designing Walsall SPD

DW3: The Council expects new development to be informed by the surrounding character and respond in a positive way to it.

DW9: The public realm can be enhanced by designing buildings to respect and enhance local distinctiveness.

Appendix D: relating to dwellings has relevance, in terms of the relationships normally expected between buildings.

It is considered in this case that the relevant provisions of SPD Designing Walsall are consistent with the NPPF.

5.0 LEGAL IMPLICATIONS

Section 172 of the Town and Country Planning Act 1990 states that the local planning authority may issue 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 any other material considerations.

Section 6 of the Human Rights Act 1998 prohibits public authorities from acting in a way which is incompatible with the European Convention on Human Rights. In considering planning enforcement in this matter, the relevant article of the Convention is Article 1 of the First Protocol – protection of property.

Article 1 is a qualified right, which means that a public authority can interfere with the right (for example, by taking enforcement action) if it is in the general public interest to do so.

Counsel has been asked to advise on the preparation of this report.

6.0 EQUAL OPPORTUNITY IMPLICATIONS

Officers do not consider that there are any equal opportunity implications.

7.0 ENVIRONMENTAL IMPACT

Enforcement action is taken to remedy adverse environmental impacts.

8.0 **WARD(S) AFFECTED**

Rushall-Shelfield.

9.0 **CONSULTEES**

None

10.0 **CONTACT OFFICER**

Paul Hinton

Development Management – 01922 652607

11.0 **BACKGROUND PAPERS**

Enforcement file not published

David Elsworthy
Head of Planning and Building Control

Planning Committee
10th April 2014

12.0 Planning Committee resolution of 21st November 2013

- 12.1 At its meeting on 21st November 2013 the Chairman of the Planning Committee read out a Motion to the Committee in relation to Brush Garage. Members resolved to receive a report at the earliest opportunity regarding enforcement matters in relation to Brush Garage and that this report is accompanied by legal advice in relation to this matter. The Chairman's Motion explains this is an exceptional case and on this occasion only he is prepared to let the matter be brought back to Committee for one final consideration.

The resolution from that meeting is as follows:

That Planning Committee receive a report at the earliest opportunity regarding enforcement matters in relation to Brush Garage and that this report is accompanied by legal advice in relation to this matter.

13.0 Planning permission 10/0211/FL ('the 2010 planning permission')

- 13.1 Until 2011 the site comprised a garage building to the rear of the site and a former house that had been converted and partly occupied and used for retail purposes. The house was roofless by 2009 and demolished entirely by May 2011. The local planning authority was first made aware of works at the site in February 2009, which, according to neighbours, commenced in August 2008. Following investigation a planning application under reference 10/0211/FL was submitted in March 2010. At its meeting on 19th August 2010, Committee resolved to grant the 2010 planning permission at the site, subject to conditions, for:
- re-roofing, repair and alterations to rear element of existing garage building; minor extensions to front of the building, formation of car parking area fronting Lichfield Road and formation of hard standing and access at rear.*
- 13.2 The site is located close to the traffic junction of Mill Lane and Lichfield Road in Sheffield and is adjacent to Sheffield Local Centre. The surrounding area is predominantly residential, with a barber's shop occupying part of the ground floor of the residential property next door (number 88). There are other commercial uses close by including hairdressers, vets, the former Spring Cottage Public House (which is now a shop) and two takeaways. To the rear of the site is open land in ownership of the Council of which part is used as a public car park.
- 13.3 The site of the previous garage building which was to the rear of the site has been combined with land to the front of the site on which had previously stood a former house partly in use for retail purposes, fronting Lichfield Road, which was demolished during 2009-2011 as part of the works undertaken at the site. This has been replaced with an area laid out for vehicle parking and an access into the site from the front of the building. The area of Council owned public space to the rear had been blocked paved without the required consent, this has now been removed.

- 13.4 Limited external work took place between July 2009 and May 2011 when works to build the proposed extension part of the building commenced. After the Committee granted the 2010 planning permission it became apparent to officers that what was being built on site was not the repair and alterations to the rear element of the original garage building, but the erection of what was a completely new building.
- 13.5 The 2010 planning permission permitted only repair and alteration and re-roofing of the original garage building. What actually occurred was that the original building was almost entirely demolished. The conclusion that a new building exists had been reached by studying photographic evidence showing the internal and external building at various stages of its development. A complete new roof and supporting frame work is in place, the rear elevation consisting of plastered breeze block, metal roller shutter door and profiled metal sheeting are all new. No part of the original rear elevation of the building remains. The side elevation of the former garage building adjacent to 84 Lichfield Road is predominantly new blockwork infilling the metal roof supports. Only very small sections of brick wall of the original garage remains. The side of the original garage building next to number 88 is all new blockwork except again, for small areas of brickwork. This makes it impossible for the 2010 planning permission to be implemented as the building it relates to no longer exists.
- 13.6 In its place is a new building (constructed from materials which are not even compliant with the 2010 planning permission in any event) in respect of which no planning permission exists. In addition, the original building had acquired its use as a garage due to the passage of time, even though such a use was non-compliant in a residential area. The demolition of the original building, however, created a new chapter in the planning history of the site, meaning the previous lawful use for the original building has been lost and the site now has a nil use in planning terms.

14.0 29th March 2012 Planning Committee

- 14.1 A report was presented on 29th March 2012 that recommended that it would be expedient to take enforcement action to demolish the new building and remove all resultant materials, rubble and other debris from the land. The reasons for proposing to take enforcement action were stated as follows:

Following demolition of the original building the site has a nil use. The erection of a replacement building has taken place for which no planning permission exists. The likely use of the site for industrial purposes in this context, between residential properties, would be unacceptable due to the potential impact on the levels of amenity residents could reasonably expect to enjoy. Furthermore, the design and scale the building is out of character with the adjacent domestic properties causing visual harm.

- 14.2 Notwithstanding the Report's recommendations, Members resolved:

That there should be no enforcement action as Members felt there had been no significant changes to the fabric of the building in relation to height, width or massing, subject to the applicant entering into a Section 106 Agreement to cover

planning conditions of 2010 [i.e. the 2010 planning permission] by July, otherwise the matter to be brought back to Committee.

15.0 26th July 2012 Planning Committee

- 15.1 A further report was presented on 26th July 2012 that requested Members to reconsider their decision of 29th March 2012 in light of the Local Government Ombudsman raising concerns that the Minute of the meeting of 29th March 2012 and the terms of the resolution did not:

a) make it plain that Members fully considered that a planning application for a new building would need to be considered in a different policy context to refurbishment of an existing building; and

b) show that Members discussed the appearance of the building and the materials used in its construction.

A draft S106 agreement including the planning conditions of the 2010 planning permission was appended to the report alongside a scale drawing of what the completed building would look like.

- 15.2 Members resolved:

To stand by the decision as recorded in the minute of the meeting of 29th March 2012 that there should be no enforcement action as Members felt there had been no significant changes to the fabric of the building in relation to height, width or massing, subject to the applicant entering into a Section 106 Agreement substantially in the form of the draft attached in the report.

16.0 Section 106 Agreement

On the 22nd January 2013 the landowner completed an agreement with the Council under S106 of the Town and Country Planning Act (appendix A). This agreement is explicit that it does not authorise any particular use or uses from the land, with the owner agreeing to seven covenants identical to conditions 2-8 of the 2010 planning permission relating to a scale drawing of the building (appendix B).

17.0 Findings of the Local Government Ombudsman

- 17.1 On 7th March 2013 the Ombudsman issued her findings in relation to complaints from two local residents about the Council's handling of various matters associated with the development at this site. The Ombudsman's finding was that maladministration causing injustice had occurred; remedy agreed.
- 17.2 The Ombudsman found that the planning authority had incorrectly treated the works being carried out as an extension and adaptation of an existing building on the site, as opposed to a new development. This meant that it did not consider the planning application against the relevant planning guidance. In 2012 Council members had two opportunities to approve enforcement action against the developer for the unauthorised new development. On both occasions they failed to consider properly the case for enforcement. As a result of the above the

Council decided not to take enforcement action against the developer, subject to the developer entering into a legal agreement.

- 17.3 The Ombudsman stated that it cannot be concluded the outcome would have been different but for the Council's failings. However, the complainants were caused injustice in the form of uncertainty about whether the outcome might have been different. In addition the Ombudsman found there was an unacceptable delay in the Council carrying out an enforcement investigation at the site and in seeking restitution of public open space at the rear which was developed without permission.
- 17.4 To remedy the injustice, the Council has, in accordance with the Ombudsman's recommendations:
- a) taken the enforcement action described above to ensure the public open space is restored to an acceptable condition;
 - b) reminded the developer that the site has no existing lawful use and there is accordingly a need to submit a planning application for any proposed use of the building on the site.

In addition the Council has:

- c) apologised to the two complainants for their injustice;
- d) paid financial compensation of £1500 each;
- e) confirmed to the Ombudsman that the three Councillors referred to in her report should take no part in relation to future proposals for the site, linked to the current situation. The Chief Executive of the Council has written to the Ombudsman confirming that the Councillors referred to will take no part in relation to future proposals for the site, linked to the current situation.

18.0 Current situation

- 18.1 In line with Committee's resolution not to take enforcement action, a section 106 agreement was completed in January 2013. While representations have been made that the building is being used for storage, officers have investigated this allegation and found no evidence of a storage use taking place. There are building materials and equipment associated with the construction of the building inside the premises; however, these elements alone would not constitute a material use. Therefore the site has not been brought into use and continues to have a nil use, as described in paragraph [13.6]. The land owner has been made aware that there is no authorised use of the building and land.
- 18.2 Since this matter was last before Committee in July 2012, the scaffolding has been removed, the galvanised metal fencing to the front has been removed and replaced with a dwarf wall similar to those in the area and the access secured with removable bollards. The details of the wall were a requirement of the section 106 agreement, which were provided and considered acceptable. The frontage area has been block paved and green fascia boards have been added to the front elevation. A glazed door and window have recently been installed into the

front opening which has been secured by an externally applied green colour coated solid roller shutter door. The block paving on the public open space to the rear has been removed and has been grassed over.

- 18.3 With the exception of the roller shutter door and the proportions of the glazed frontage (the door on the left hand side rather than the right), the building has been externally completed in accordance with the plans of the building that accompanied the section 106 agreement. No planting, as indicated on the plan immediately behind the front boundary wall, has taken place at this time, although details as per the requirement of the section 106 agreement have been provided and found to be acceptable. The section 106 requires this to be provided prior to first occupation.
- 18.4 The addition of a solid roller shutter door and the proportions of the glazing were not part of the drawing upon which it was resolved not to take enforcement action and the expediency of further action against these elements is considered below.
- 18.5 It is considered that the situation on site is therefore largely as Members would have expected following their decision not to instigate enforcement action and securing a section 106 agreement.

19.0 Consideration of enforcement matters

- 19.1 This issue has been requested to be brought back to Committee for one final consideration of enforcement matters. In making a decision, two years after the original recommendation to take enforcement action requiring the demolition of the building, Members will need to be satisfied to the expediency of now taking enforcement action and any consequences of such action.
- 19.2 Section 172 of the Town and Country Planning Act states that the local planning authority may issue 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 any other material considerations.
- 19.3 In the two previous reports officers explained that the erection of a building without planning permission is a breach of planning control. In assessing the impacts of this building it was recommended that the building was contrary to the provisions (policies) of the development plan. What has been built is an entirely new building, not repairs and alterations approved by the planning permission. The materials used in the construction of the building, part breeze block walls and metal profiled roof is not the facing brickwork and tiles as stated on the planning application form.
- 19.4 The site is located in a predominately residential area. A proposal for a new industrial style building sandwiched between residential uses is contrary to the saved policies of the Development Plan. The 2010 planning permission was granted because of a longstanding use of an existing building on the site for vehicle repairs which was understood to be the 'lawful position' at that time. The demolition of the old buildings, the consolidation of the front and rear parts of the site and the erection of the new building creates a new chapter in the planning

history of the site. The effect of the unauthorised development is that the lawful use rights of the previous buildings have been lost.

- 19.5 The use of a metal profiled roof is out of character with other roof types in the locality which are of traditional clay and concrete tile construction. The height and length of the building in close proximity to the ground floor lounge window of both neighbouring properties has an adverse impact upon the outlook from these properties to the detriment of residential amenity. The general scale and proportions of the building is out of character with its surroundings. The adjoining neighbour previously commented that the extension part of the building enclosed their rear garden which they consider has affected the sunlight and daylight to their garden and furthermore the industrial building spanning the whole length of the rear garden adversely affects visual amenity
- 19.6 The building has the character of having been designed for an industrial use. Although the site now has a nil use, an unrestricted industrial use sandwiched between residential properties, spanning the whole depth of their gardens could potentially give rise to unacceptable noise and disturbance by virtue of its operations. However, in order for any future industrial or commercial use to commence, planning permission would be required.
- 19.7 To balance against the considerations mentioned above in support of enforcement action Members were also advised that they could consider whether the following considerations could mitigate against taking enforcement action, namely such considerations as:
- a) the long history of employment use on the site and the benefits of retaining potential employment generating development on the site;
 - b) that there was previously an industrial building on the site of similar scale and bulk which was replaced by the new building;
 - c) that the Council had previously granted planning permission for a scheme comprising alterations and repairs that would have created a building that was considered acceptable in terms of scale and bulk;
 - d) that the owner of the site was prepared to enter into a planning obligation under Section 106 of the Town and Country Planning Act to provide a degree of protection of residential amenity;
 - e) that the new building currently has a nil use and therefore any use would require planning permission; any application for planning permission would have to be considered on its merits and if acceptable could be granted subject to conditions.
- 19.8 Members had these assessments before them in the reports to the 29th March and 26th July 2012 Committees and were also given a photographic presentation of the previous building and what it looked like at the time of the reports. In considering section 172 and whether it was expedient to issue an Enforcement Notice Members felt there had been no significant changes to the fabric of the building compared to the 2010 planning permission in relation to height, width or massing, subject to the applicant entering into a section 106 Agreement, a draft

of which was before them. Members considered these material considerations outweighed any harm to residential amenity and the character of the area. Accordingly Members did not consider it expedient to take enforcement action.

- 19.9 For the sake of consistency, any justification for enforcement action now to be taken would require a material change of circumstances on the basis of which Committee previously resolved not to take enforcement action. There have been no changes to the height, width or massing of the building that Members previously resolved not to enforce against. The differences to the frontage glazing, with the door and window switched round have no material harm upon the appearance of the area. The solid green colour coated roller shutter door is viewed in the context that there is an existing solid roller shutter door powder coated green on the front of the building. This additional roller shutter door is set back some 15.4m from the back of the pavement. The established building line is approximately 4m from the back of the pavement, as a consequence the roller shutter door is not prominent in the street scene. This addition to the building is not considered to cause significant harm to the visual amenity of the area and consequently not considered to warrant enforcement action alone.
- 19.10 Officers are therefore of the view that there have been no material changes to the situation that led Members to resolve that enforcement action was not expedient and the justification of that decision has been reinforced; in particular:
- Members' previous decision not to enforce was not the subject of any legal challenge and is valid and still applies;
 - The only significant works carried out by the owner since that decision are those to comply with the obligations in the section 106 agreement (save for those works detailed in paragraph [19.9] which do not justify enforcement action on their own), meaning the new building is unchanged;
 - The Council has fully complied with all the recommendations of the Local Government Ombudsman and provided a remedy in respect of the maladministration findings as required by the Local Government Ombudsman;
 - The owners of adjoining residential property have been paid compensation by the Council;
 - The Council's land to the rear has been reinstated as public open space and the hard standing has been removed;
 - The owner of the site has made no attempt to commence any new use.

20.0 Resolving to now take enforcement action

- 20.1 Members are advised that officers do not consider there have been any material changes in circumstances since the previous resolution not to take enforcement action that would justify enforcement action at this time. This is because:
- i. the Planning Committee previously accepted on two occasions that the development should not be enforced against;
 - ii. there have been no material changes in circumstances since the most recent decision in July 2012 not to take enforcement action;
 - iii. pursuant to the decision not to enforce, the owner of the land has entered into a section 106 agreement (which provides a material control of the site);

- iv. the owner has, in accordance with the section 106 agreement entered into pursuant to the decision not to enforce, carried out works to the building in or order to comply with the obligations in the agreement, in full knowledge of the Council;
- v. the owner has been made aware there is no authorised use of the land or building, and has been informed a planning application needs to be made should any use occur;
- vi. the Council has remedied the maladministration findings as required by the Local Government Ombudsman, who did not find for the Council to reconsider its previous decision and which included compensating the complainants, which has taken place;
- vii. the Council's land to the rear has been reinstated as public open space.

If Members wish to pursue enforcement, they will need to provide clear reasons for doing so.

- 20.2 The expediency assessment allows the Council to consider non-planning issues, such as fairness to the landowner (in light of his co-operation with the previous resolution) and the reputation of the fairness of the Planning Committee.
- 20.3 The building has been erected in breach of planning control and unless or until the development that has occurred becomes lawful, either by the grant of planning permission or by the passage of time under the four year rule of the Town and Country Planning Act (officers consider this to be around April 2016), enforcement action in respect of that breach of planning control can be taken at any time. Notwithstanding its previous resolutions there is no lawful way that the Planning Committee is bound by its previous decision as this would fetter its discretion to take enforcement action against the unlawful built development at any time until the works become immune from enforcement by the expiry of the four years qualifying period or by the grant of planning permission. The decision not to enforce against the building does not prevent the Council from taking enforcement action in the event of any use commencing without planning permission.
- 20.4. New Guidance has been issued in the National Planning Practice Guidance (NPPG) published on 6 March 2014. This 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."*

Any enforcement notice would need to be directed at the erection of the building and would presumably seek to require the complete demolition of the building. Given the history of this matter, the tight control of the site that is now maintained by the previous action taken by the Council, the remedial action carried out in accordance with the Ombudsman's requirements and the compliance of the owner with the section 106 obligation, it is now hard to see what further justification exists for issuing an enforcement notice to require the building to be demolished. In short, given the Council's control on the impact on amenity that now exists and the remedial action that has already been secured, such action would not be proportionate. Such action would be likely to be seen as

contradictory and perverse, at this stage, given the long history of this matter and previous decisions and actions of the Council. There is a real risk of serious damage to the Council's reputation and substantial costs being incurred. Worse still there is the potential that such action could result in the Council's control over the future use of the site being weakened.

- 20.5 In the event of an enforcement notice being issued, the owner would have a statutory right of appeal which, given the circumstances, would more than likely be determined through the public inquiry procedure. Both the appellant and the Council could seek a costs application in the case of unreasonable behaviour. In the appellant's case, weight would almost certainly be given to the two year period between the Council resolving not to take enforcement action and then proceeding to do so. Given the history of the matter, the prospects of any enforcement action succeeding are likely to have been severely weakened while the risk of a costs award against the Council are increased.
- 20.6 Previous guidance on costs contained in Costs Circular 03/2009 has been revoked as from 7 March 2014. New guidance in the National Planning Policy Guidance was published on 6 March 2014, but the principles remain the same. If the issue of the enforcement notice were found to be unreasonable, the Council could be liable for the whole of the appellant's costs. All the circumstances set out in paragraph [20.1] above would be considered when deciding whether costs should be awarded and the issue of costs would be very carefully scrutinised by an Inspector on appeal. It is understood that the developer has taken his own legal advice from leading counsel. The costs bill if it went to public inquiry could therefore be high. Counsel advises from experience a six figure sum would not be unusual for a matter such as this.
- 20.7 The land owner might also or alternatively challenge the decision to issue an enforcement notice by way of judicial review, on the grounds that, in the circumstances, the issue of an enforcement notice to require the demolition of the building would not be proportionate and would therefore be unlawful.
- 20.8 In addition it would also be open to the land owner to make a complaint to the Local Government Ombudsman on the grounds of no material changes since the previous resolution and any consequent findings of expediency to take enforcement action could be a further finding of maladministration.
- 20.9 If Members resolved not to take enforcement action against the building, it would, in the opinion of officers, be in the continued knowledge that there is no authorised use of the building and land and accordingly any lawful use would require planning permission which could be subject to conditions to protect amenity. The S106 agreement provides a further level of control. If a suitable use for the building could be identified, it is arguable that it could assist in bringing small scale and much needed economic development and employment to the local area.
- 20.10 If Members resolved to take enforcement action, officers would recommend to rectify the breach of planning control and the harm the building has on visual and residential amenity (for the reasons at stated in 14.1 above), any enforcement action would be to demolish the building and remove all resultant materials, rubble and other debris from the land. In line with the original recommendation a

compliance period of four months would be reasonable. This would result in a cleared site. It is important to consider that there would be no certainty that any other development would be forthcoming.

This agreement was not completed alongside planning permission 10/0211/FL. It was completed as part of an enforcement matter at this site.

Dated

• 22 January

2012/3

WALSALL METROPOLITAN BOROUGH COUNCIL

and

LICHFIELD PROPERTIES LIMITED

**AGREEMENT UNDER SECTION 106
OF THE TOWN AND COUNTRY PLANNING ACT 1990**

Relating to land at

86 Lichfield Road, Shelfield, Walsall

Walsall Metropolitan Borough Council
Legal Services
Civic Centre
Darwall Street
Walsall
WS1 1TP

THIS DEED is made the 22nd day of

January

2012 3

BETWEEN

- (1) WALSALL METROPOLITAN BOROUGH COUNCIL of the Civic Centre, Darwall Street, Walsall, West Midlands, WS1 1TP ('the Council'); and
- (2) LICHFIELD PROPERTIES LIMITED (Company Registration No. 95034 at Companies House Gibraltar, 1st Floor, The Arcade, 30-38 Main Street, PO Box 848, Gibraltar) and whose registered office is at 57 – 63 Linewall Road, Gibraltar ('the Owner')

BACKGROUND

- (A) For the purposes of the 1990 Act the Council is the local planning authority for the area within which the Land is located and the party who is entitled to enforce the obligations contained in this Agreement
- (B) The Owner is the freehold owner of the whole of the Land (save for the part hatched red on the Plan) free from encumbrances which would prevent the Owner entering into this Agreement
- (C) The Council owns that part of the Land hatched red on the Plan
- (D) The parties have agreed to enter into this Agreement with the intention that the obligations contained herein may be enforced by the Council against the Owner and its respective successors in title
- (E) By resolution of the Council's Planning Committee on 26 July 2012 the Council is authorised to enter into this Agreement.

OPERATIVE PROVISIONS

1. INTERPRETATION

- 1.1 In this Agreement the following words and expressions have the following meanings:

| | |
|---------------|---|
| "1990 Act" | The Town and Country Planning Act 1990 |
| "Development" | The works undertaken on the Land as detailed on 0919 – 1 Rev D contained at Annex 1 of this Agreement |
| "Land" | The land shown edged red on the Plan against which this Agreement may be enforced, including all premises thereon |
| "Occupation" | Occupation for the purposes of being open for |

business and trade
"Plan" The plan attached to this Agreement

1.2 In this Agreement:

- 1.2.1 the clause headings do not affect its interpretations
- 1.2.2 unless otherwise indicated references to clauses and Schedules are to clauses of and Schedules to this Agreement and references in a Schedule to a Part or paragraph are to a Part or paragraph of that Schedule
- 1.2.3 references to any statute or statutory provision include references to
 - 1.2.3.1 that statute or statutory provision as from time to time amended extended re-enacted consolidated or replaced; and
 - 1.2.3.2 any orders, regulations, instruments or other subordinate legislation made under that statute or statutory provision whether before or after the date of this Agreement.
- 1.2.4 references to the Land include any part of it
- 1.2.5 references to any party in this Agreement include the successors in title of that party and assigns. In addition, references to the Council include any successor local planning authority exercising planning powers under the 1990 Act
- 1.2.6 "including" means "including, without limitation"
- 1.2.7 any covenant by the Owner not to do any act or thing includes a covenant not to permit or allow the doing of that act or thing
- 1.2.8 where two or more people form a party to this Agreement the obligations they undertake may be enforced against them all jointly or against each of them individually
- 1.2.9 if any provision is held to be illegal, invalid or unenforceable, the legality, validity and enforceability of the remainder of the Agreement is to be unaffected
- 1.2.10 words importing the singular shall include the plural and vice versa



- 1.3 The parties to this Agreement do not intend that any of its terms will be enforceable by virtue of the Contracts (Rights of Third Parties) Act 1999 by any person not a party to it
- 1.4 No party will be liable for any breach of the terms of this Agreement occurring after the date on which they part with their interest in the Land or the part of the Land in respect of which such breach occurs but without prejudice to any breaches of this Agreement occurring before parting with such interests. Neither the reservations of any rights nor the inclusion of any covenants or restrictions over the Land in any transfer of the Land will constitute an interest for the purposes of this sub-clause
- 1.5 The obligations in this Agreement will not be enforceable against a statutory undertaker after the transfer of the statutory apparatus and any land upon or in which the statutory apparatus is situated by the Owner to that statutory undertaker
- 1.6 Nothing in this Agreement shall authorise any particular use or uses of the land and the acceptability of any future use shall not be inferred from the Council entering into this Agreement
- 1.7 No waiver (whether expressed or implied) by the Council or the Owner of any breach in default performing or observing any of the covenants terms and conditions of this Agreement shall constitute a continuing waiver and no such waiver shall prevent the Council or the Owner from enforcing any of the relevant terms or conditions or from acting upon any subsequent breach or default

2. EFFECT OF THIS AGREEMENT

- 2.1 This Agreement is made pursuant to section 106 of the 1990 Act and to the extent that they fall within the terms of section 106 of the 1990 Act the obligations contained in this Agreement are planning obligations for the purposes of section 106 of the 1990 Act and are enforceable by the Council
- 2.2 To the extent that any of the obligations contained in this Agreement are not planning obligations within the meaning of the 1990 Act, they are entered into pursuant to the powers contained in section 111 Local Government Act 1972, section 2 Local Government Act 2000 and all other enabling powers
- 2.3 Nothing in this Agreement restricts or is intended to restrict the exercise at any time by the Council of any of its statutory powers, functions or discretions in relation to the Land or otherwise
- 2.4 This Agreement will be registered as a local land charge by the Council

3. COMMENCEMENT

The provisions of this Agreement shall have immediate effect on the date upon which it is completed

4. OBLIGATIONS OF THE OWNER

The Owner covenants with the Council as set out in Schedule 1

5. TERMINATION OF THIS AGREEMENT

This Agreement will come to an end where the parties each confirm in writing that they consent to its termination or where the circumstances on the Land change such that the parties agree that the Agreement (or any part of it) has become irrelevant or unviable and thereafter the Council shall vacate or cancel the entry made in the local land charges register in relation to this Agreement or otherwise record the fact that it has come to an end and no longer affects the Land

6. CHANGE IN OWNERSHIP

The Owner agrees to give the Council immediate written notice of any change in ownership of any of its interests in the Land such notice to give details of the transferee's full name and registered office (if a company address or usual address if not) together with the area of the Land or unit of occupation purchase by reference to a plan

7. ENFORCEMENT

7.1 This Agreement is to be governed by and interpreted in accordance with the law of England

7.2 The Courts of England are to have jurisdiction in relation to any disputes between the out of or related to this Agreement. This clause operates for the benefit of the Council who retains the right to commence any court action or proceedings against the Owner and enforce any judgment against the Owner in the courts of any competent jurisdiction

8. DISPUTE

Any dispute or disputes between any of the parties to this Agreement arising out of the provisions of this Agreement (other than a dispute or difference relating to a matter of law or concerning the meaning or construction of this Agreement) shall be referred to a single arbitrator to be agreed between the parties or in default of agreement on the application of any party by the President of the Royal Institute of

Chartered Surveyors in accordance with the Arbitration Act 1996 or any statutory modification or re-enactment for the time-being in force.

SCHEDULE 1
Owner's Covenants

The Owner covenants that it will comply with the requirements below in relation to the Development:

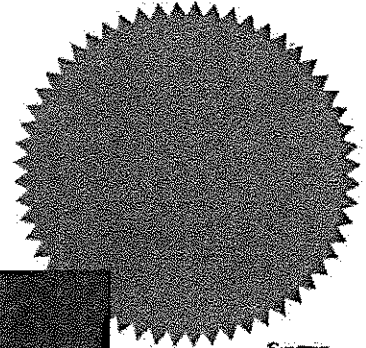
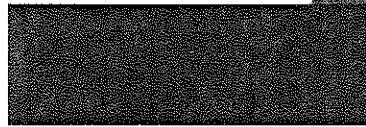
1. Prior to first Occupation of the premises a boundary wall to reflect the height and detailing of the surrounding properties and planting shall be provided to the front boundary in accordance with details to be submitted to and approved in writing by the Local Planning Authority. Once installed the wall shall be maintained and retained thereafter.
2. Prior to first Occupation of the premises the roller shutter vehicle access door on the rear and front elevation of the workshop building shall be colour coated a colour to be submitted to and approved in writing by the Local Planning Authority and once painted shall be maintained and retained thereafter.
3. Prior to first Occupation of the premises refuse storage facilities shall be implemented in accordance with details to be submitted to and approved in writing by the Local Planning Authority.
4. Operations, including collections, deliveries or despatches to and from the premises shall not take place on any Sunday, Bank Holiday or Public Holiday*, and otherwise shall only take place between the hours of 08.00 to 18.00 weekdays and 08.00 to 16.00 Saturdays unless otherwise permitted in writing by the Local Planning Authority.
(Bank and Public holidays for this purpose shall be: Christmas Day; Boxing Day; New Year's Day; Good Friday; Easter Monday; May Day; Spring Bank Holiday Monday and August Bank Holiday Monday).*
5. Noise from fixed plant and machinery associated with the premises shall not give rise to a Rating Level exceeding 5 dB as determined in accordance with the methodologies contained British Standard BS 4142: 1997 'Method for Rating industrial noise affecting mixed residential and industrial areas'.
6. The blocked paved area to the rear of the premises, shown for identification purposes on plan 0919 - 1 Rev D contained at Annex 1 (and being the area hatched in red on the Plan) shall not be used to park vehicles and shall remain unobstructed at all times.

7. The parking area on the frontage of the Land shall be used for this purpose only and no work on vehicles or storage of materials, goods or refuse shall take place in the open on any part the front parking area of the Land.

IN WITNESS of which the parties have executed this Agreement as a deed on the date first written above

THE COMMON SEAL of)
WALSALL METROPOLITAN BOROUGH)
COUNCIL)
Was hereunto affixed in the presence of)

Authorised Signatory)



5072

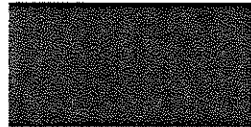
EXECUTED as a DEED by)
LICHFIELD PROPERTIES LIMITED)
Acting by:)



Patricia Smith

Director)

~~Director~~/Secretary)

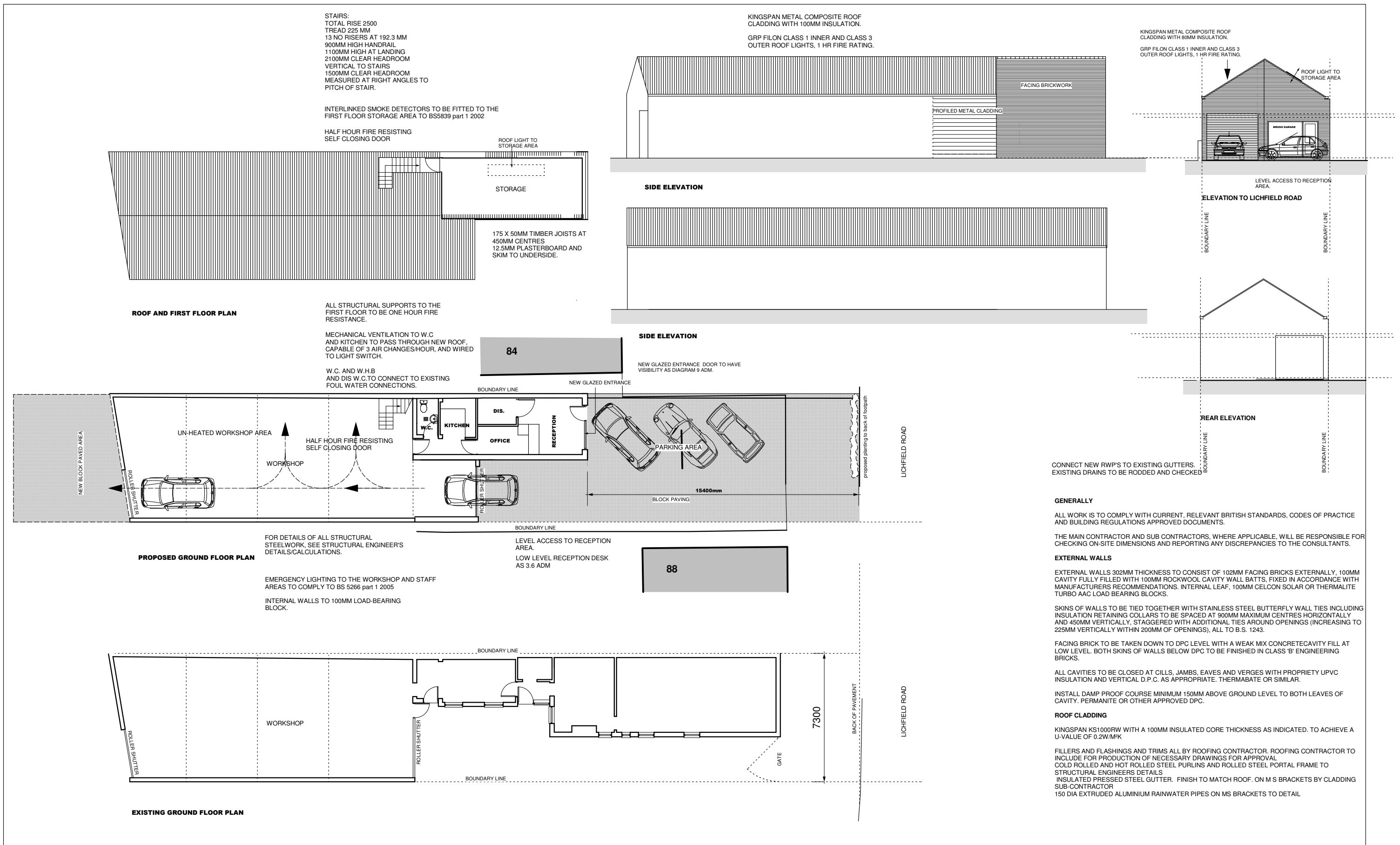


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Francesca Cano

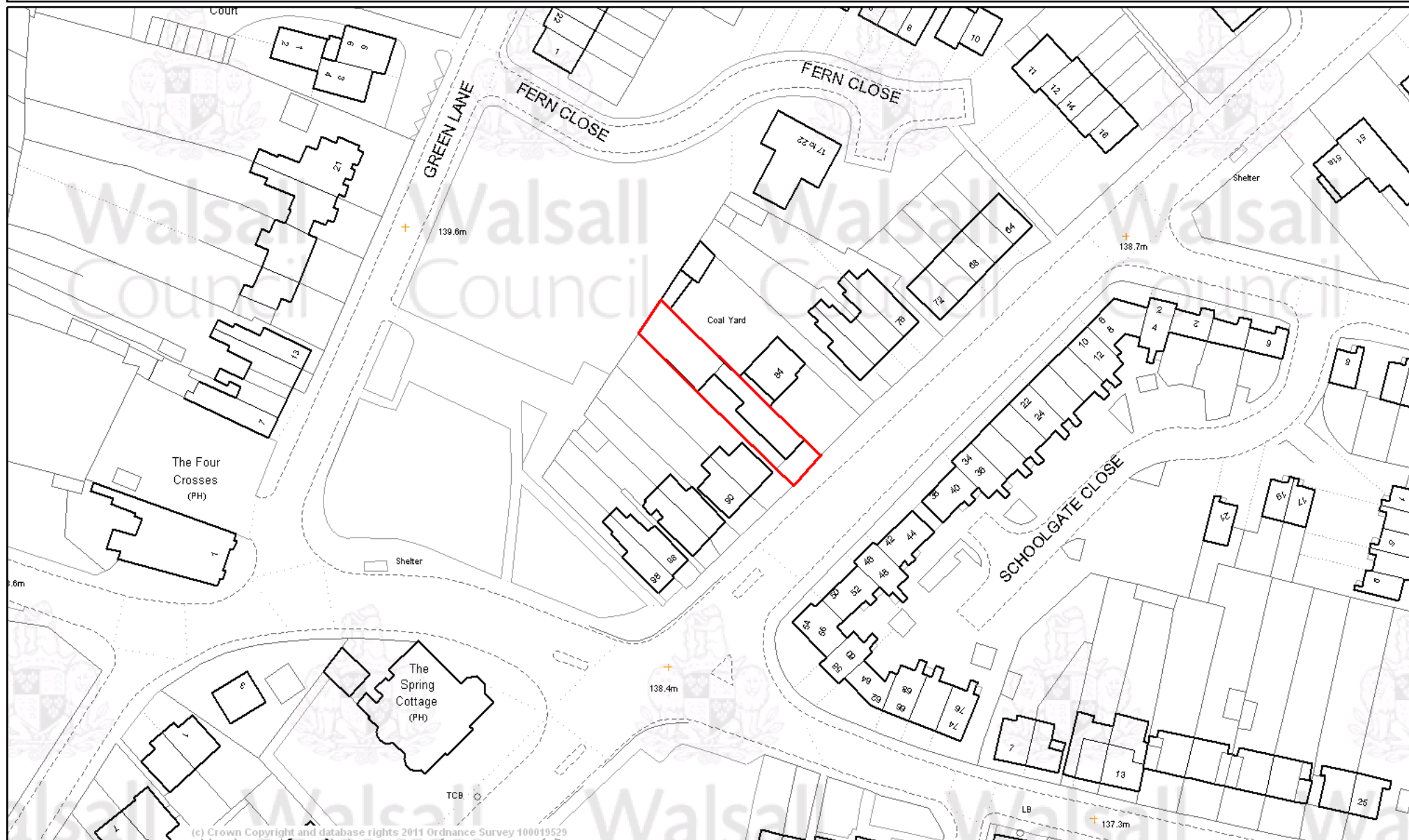
ANNEX 1

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| ARCHITECTS SPOONER ARCHITECTS NUMBER 2 THE GUILDHALL LICHFIELD ROAD, SUTTON COLDFIELD WEST MIDLANDS, B74 2NU T: 0121 355 0255 F: 0121 355 0515 | SERVICES CONSULTANT | REVISIONS | REV | BY | CHKD | CLIENT <div> MR. P. MERRICK </div> <div> 2 the guildhall, lichfield road, sutton coldfield, west midlands, B74 2NU t: +44 (0)121 355 0255 f: +44 (0)121 355 0515 e: spooner@spoonerarchitects.co.uk web: www.spoonerarchitects.co.uk </div> |
| | | north east boundary wall added - sept '10 | A | | | |
| | | building regulation notes added - august '11 | B | | | |
| | | updated for building regs - june '12 | C | | | |
| | | amended in accordance with e-mail from Paul Hinton dated 24 july '12 - june '12 | D | | | |
| CONTRACTOR | | | | | | PROJECT <div> PROPOSED ALTERATIONS TO BRUSH GARAGE LICHFIELD ROAD SHELFIELD WALSALL </div> |
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| STRUCTURAL ENGINEER | | | | | | DRAWING <div> GENERAL ARRANGEMENT </div> |
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86 Lichfield Road, Shelfield, Walsall, WS4 1PY



Walsall Council

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Date 2/11/2011

