SOUTH HOLLAND DISTRICT COUNCIL

Report of: **Development Manager**

To: **Planning Committee - 05 October 2022**

(Author: **Lucy Buttery - Principal Planning Officer)**

Purpose: **To consider Planning Application H09-0765-22**

Application Number:	H09-0765-22	**Date Received:**	02 August 2022
Application Type:	S192 LAWFUL USE CERT		
Description:	Sale of bric-a-brac on a charitable basis for no more than three days a week between the hours of 10.00am and 4.00pm excluding Sundays and Bank Holidays.		
Location:	90 BOSTON ROAD SOUTH HOLBEACH SPALDING		
Applicant:	Mrs A Gregory	**Agent:**	Mrs A Gregory
Ward:	Holbeach Town	**Ward Councillors:**	Cllr F Biggadike Cllr T Carter Cllr G T D Rudkin

You can view this application on the Council's web site at
http://planning.sholland.gov.uk/OcellaWeb/planningDetails?reference=H09-0765-22

1.0 REASON FOR COMMITTEE CONSIDERATION

1.1 The level of public representations warrants Committee consideration.

2.0 PROPOSAL

2.1 This is an application for a Lawful Development Certificate to confirm that the 'Sale of bric-a-brac on a charitable basis for no more than three days a week between the hours of 10.00am and 4.00pm excluding Sundays and Bank Holidays' ("Use") at 90 Boston Road South, Holbeach, ("Property") does not require planning permission.

2.2 The application form states that items are sold for charity from an existing car port and a small area of land in front of said car port.

2.3 A fence has been constructed on the boundary, but the Council are of the view that this has been done under permitted development rights and does not fall within the remit of this application.

3.0 SITE DESCRIPTION

3.1 90 Boston Road South is a detached bungalow sited at the northern end of the road, close to the roundabout with the A17. It sits within a relatively large plot with large drive to the front and car port to the side. There are residential dwellings to the south-east, south-west/west and north-west. There are zig-zag road markings immediately outside the property due to the proximity to the primary school.

4.0 RELEVANT PLANNING POLICIES

4.1 South East Lincolnshire Local Plan (2019) and National Planning Policy Framework (2021) not applicable as this is a legal determination and planning policy is not relevant to the determination as to whether the proposed use would be lawful.

5.0 RELEVANT PLANNING HISTORY

5.1 None.

6.0 REPRESENTATIONS

6.1 Cllr T Carter

100% support this application and have worked with the applicants throughout. They raise huge amounts of funds for such a good cause, and also provide a social element for those walking by, walking their dogs etc. often providing the only conversation for some passers by all day long. A tremendous family doing wonderful things and strongly support.

6.2 SHDC Environmental Protection

No objection.

6.3 LCC Highways

Does not wish to restrict the grant of permission.

Comments dated 1st September 2022:

Although no dedicated area of off-street car parking, other than the domestic driveway of the property, is being proposed, customers who are not simply passing by on foot would be able to park their vehicle safely, conveniently and without unreasonably obstructing local residents' access, on the old part of Boston Road South that is opposite the application site. Therefore, having given due regard to the appropriate local and national planning policy guidance (in particular the National Planning Policy Framework), Lincolnshire County Council (as Highway Authority and Lead Local Flood Authority) has concluded that the proposed use would not be expected to have an unacceptable impact upon highway safety and does not wish to object to this planning application.

Comments dated 8th September 2022:

Further to my final response, dated 1 September 2022, on this Lawful Use Application, I have made enquiries at the local highways office. The Highways Officer covering the Holbeach area has advised that whilst she is aware that sales are being conducted from 90 Boston Road South, the highway authority has received no complaints about vehicles being parked on the highway nor any complaints about parked vehicles causing obstruction to neighbours or other road users. The property's existing garage and driveway are of sufficient size to accommodate both the residents' vehicles and some customer car parking and, in the event that there should be an un-expected rush of car-borne customers, it is possible to park safely on the cul-de-sac part of Boston Road South opposite the site without unduly obstructing the passage of other road users. Any customer parking along the through road part of Boston Road South that might be injudicious would be a matter for the conscience of those individual drivers and the need for any enforcement against such action would be for the Police to consider in the course of their normal duties. Given the low-key nature of these sales and the fact that they have now been conducted for some while with no recorded evidence of issues or complaints, the highway authority's position is that had this been a simple Planning Application for a partial change of use of the property, there would not be sufficient cause to withhold the grant of Consent by reason of the sales use being expected to have an unacceptable impact upon highway safety.

6.4 Public representations

56 representations in support, 2 objections, 5 comments and 1 no observations have been received.

6.5 Public comments in support (summarised)

- Vast majority of comments are short in nature but highlight that they are supportive of the applicants work and her support of the charity
- Community spirit
- Safe places to park
- Site always tidy and no rubbish lying around
- Helping others buy well-priced items

There is also an online petition in support of the applicant and their activities on site. The number of signatures stood at 257 at the time of finalising the report.

6.6 Public comments in objection (summarised)

- Site close to roundabout with A17
- No parking outside property
- Pavement and cycle lane being obstructed by customers
- Customers parking on zig zag lines
- Parking half on grass verge
- Business running from a private residence detracts from appearance of the area
- Goods being sold on behalf of house clearance business
- Second hand goods delivered by cars and van
- Unsold goods stored in car port are a fire risk
- Impact on property value
- Impact on residential amenity

7.0 CONSIDERATIONS

7.1 Planning Considerations

7.2 Regarding the determination of certificates of lawfulness the National Planning Practice Guidance states that "A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application." Section 192 of the Town and Country Planning Act 1990 (as amended) states "If, on an application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect." This means that the Council cannot consider such an application against the development plan or other material planning considerations, but can only determine whether the works would be lawful under national legislation and therefore not need planning permission from the Council.

7.3 Officers have sought an external legal opinion on the application, which has been built into this report. The key elements for consideration are as follows; namely does the Use constitute development requiring planning permission.

7.4 The Council must decide, when determining the Application and deciding whether to grant a certificate, whether the Use is one that does not require planning permission and is therefore currently lawful. The alternative is that the time period for enforcement has expired, but there is no suggestion in the Application that the Use has been ongoing for over 10 years so would therefore be immune from enforcement action.

7.5 Planning permission is required for the carrying out of any "development", which for relevant purposes here includes "material changes of use". Section 55 (2) of the 1990 Act also confirms that "the use of any buildings or other land within the curtilage of a dwellinghouse for any purpose incidental to the enjoyment of the dwellinghouse as such" is not to be taken for purposes of the legislation to involve development, and therefore does not require planning permission.

7.6 There is no clear statutory definition of what constitutes a material change of use; it is a question of fact and degree to be determined by the local planning authority in exercise of their planning judgment having considered the significance of the change and any resulting impact on the property.

7.7 There are two questions to consider therefore:
-Firstly, whether the Use constitutes a material change of use; and
-Secondly, if so, whether such use is considered to be incidental to the enjoyment of the dwellinghouse. If the Use is considered incidental, then this would not amount to development requiring planning permission even in a situation where it was considered that the Use was a material change of use.

7.8 In respect of the question as to whether there is a material change of use, we are not aware that there is any argument that the current lawful use of the Property is other than as a residential dwelling. Therefore, this is the use that the current use must be assessed against to determine whether there has been a material change of use. It is also apparent from a site visit and photographs of the Property that there is no functional separation between the residential and sales uses; we consider that the relevant planning unit must be the Property including its curtilage and therefore it is the use of the Property as a whole which must be assessed.

7.9 It is a matter of planning judgment for the Council as to whether there is a material change of use (i.e. the residential character of the Property has been changed), and this is likely to require consideration of such matters (amongst any other factors Members consider to be relevant) as:
-Increase in the number of persons coming and going to the property (e.g. customers and those delivering items);
-Disturbances to neighbours beyond what could be expected of a neighbouring property (e.g. noise and visual impact);
-The character of the particular area (e.g. the closeness of the properties and the amount of through traffic).

7.10 In terms of the above, clearly there has been an increase in the number of persons coming and going from the property in order to purchase and/or donate items. The applicant has verbally relayed to officers that there are usually up to 10 customers a day, which is relatively modest in number. However, it should be said that, in reality, there can be no enforceable control over the exact numbers that may visit as the sale is open to all. This would be the case even should the application be a full application, rather than a lawful development certificate.

7.11 The sale / display area of items is contained to the area within the car port at the side of the dwelling and a small area in front. Whilst an objector has raised amenity concerns, given the nature of the items being sold and the scale of the Use, it is not considered that there is a significant adverse impact on the neighbouring dwelling beyond that which could be expected from a neighbouring residential dwelling. That is not to say that there is no impact, but that it is not considered to be material or alter the officer's judgment as to whether a material change of use has occurred. The Council's Environmental Protection Officer has raised no objection.

7.12 Concern has also been raised over highway safety and parking arrangements, and photographic evidence has been provided by an objector of customers parking on the grass verge, across the footway and cycle way and zig zag lines outside the Property. The Highway Authority are aware of this and have commented as follows:

"The Highways Officer covering the Holbeach area has advised that whilst she is aware that sales are being conducted from 90 Boston Road South, the highway authority has received no complaints about vehicles being parked on the highway nor any complaints about parked vehicles causing obstruction to neighbours or other road users. The property's existing garage and driveway are of sufficient size to accommodate both the residents' vehicles and some customer car parking and, in the event that there should be an un-expected rush of car-borne customers, it is possible to park safely on the cul-de-sac part of Boston Road South opposite the site without unduly obstructing the passage of other road users. Any customer parking along the through road part of Boston Road South that might be injudicious would be a matter for the conscience of those individual drivers and the need for any enforcement against such action would be for the Police to consider in the course of their normal duties. Given the low-key nature of these sales and the fact that they have now been conducted for some while with no recorded evidence of issues or complaints, the highway authority's position is that had this been a simple Planning Application for a partial change of use of the property, there would not be sufficient cause to withhold the grant of Consent by reason of the sales use being expected to have an unacceptable impact upon highway safety."

7.13 The character of the area is residential, however there is only one immediate neighbour (on the south-eastern side). Boston Road South experiences a large level of through traffic as one of

the main roads into the centre of the town and the dwelling is also close to a school. On the basis of this, it is not considered that the comings and goings associated with a Use that is considered relatively small in scale has an impact on the character of the area or the Property.

7.14 Despite Officers' assessment above, quite clearly in the circumstances of this case, it is considered that whether a material change of use has or has not occurred could be argued either way. The position is not clear cut and is ultimately a matter of planning judgment. Officers are of a view, that on balance, and in light of the above considerations, the activity does not constitute a material change of use. However, this is clearly a matter for the decision taker, which in this instance is the Planning Committee.

7.15 Even if there is a material change of use, if such use is incidental to the enjoyment of the dwellinghouse then it will not constitute development and so no planning permission would be required. Again, this is a matter of planning judgment that may sensibly be argued either way in this case. If the Use is considered to be incidental to the enjoyment of a dwellinghouse, no enforcement action could be taken even if considered to be a material change of use because such use would not be "development" and therefore a certificate could be granted.

7.16 In the context of the above considerations officers, on balance, are of the view that the activity is incidental to the enjoyment of the dwellinghouse. It is considered, as a matter of planning judgement, that this use is not dissimilar to that of regular garage sales, or other similar uses, that one would expect to be undertaken at a residential property. However, ultimately, this is a matter for the decision taker, which in this instance is the Planning Committee.

7.17 Drawing all the strands together the position can be argued both ways. On one hand it may be concluded that the Use based on its scale and limited impacts as a matter of planning judgment is not material, and can be regarded as simply incidental to the enjoyment of the dwellinghouse. This is the view, on balance, of officers.

7.18 On the other hand, it may be argued not to be, because of the level of commercial activity which could be said to be very different in terms of duration and scale to the types of bric-a-brac and garage sales one would more routinely associate with residential dwellings.

7.19 Appeal decisions and cases make clear that ultimately this is a matter of the decision maker's planning judgment.

7.20 If the Application is granted, of concern would be the Applicant's ability to exceed the number of days or operating hours beyond that contained in the certificate. If the Applicant did, officers consider it may be more difficult for the Council to defend enforcement action on the basis that an increase in such use constituted a material change of use in a situation where some level of use was accepted to not constitute development. To combat this risk, officers recommend seeking a Unilateral Undertaking from the Applicant prior to issue of any certificate. This may:
-restrict the Use of the Property to three days a week between the hours of 10am and 4pm excluding Sundays and Bank Holidays; and
-restrict the Use to certain parts of the Property, e.g. the garage and small area outside.
The Unilateral Undertaking would therefore guard against any future concerns, debates or erosion of understanding regarding what is lawful in this regard, and accord with the basis on which any certificate is granted.

7.21 Conclusion

7.22 Officers are of a view that, on balance, the small scale of the use and its limited amenity impact can be taken to mean that the activity does not constitute a material change of use of the Property and in any event the Use is incidental to the enjoyment of the dwellinghouse. However, this is ultimately a debate for the decision taker, which in this instance is the Planning Committee.

7.23 **Additional Considerations**

7.24 Public Sector Equality Duty

In making this decision the Authority must have regard to the public sector equality duty (PSED) under s.149 of the Equalities Act. This means that the Council must have due regard to the need (in discharging its functions) to:
A. Eliminate unlawful discrimination, harassment and victimisation and other conduct prohibited by the Act.
B. Advance equality of opportunity between people who share a protected characteristic and those who do not. This may include removing or minimising disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic; taking steps to meet the special needs of those with a protected characteristic; encouraging participation in public life (or other areas where they are underrepresented) of people with a protected characteristic(s).
C. Foster good relations between people who share a protected characteristic and those who do not including tackling prejudice and promoting understanding.

The protected characteristics are age, disability, gender reassignment, pregnancy and maternity, race, religion or belief, sex and sexual orientation.

The PSED must be considered as a relevant factor in making this decision but does not impose a duty to achieve the outcomes in s.149. It is only one factor that needs to be considered, and may be balanced against other relevant factors.

It is not considered that the recommendation in this case will have a disproportionately adverse impact on a protected characteristic.

7.25 Human Rights

In making a decision, the Authority should be aware of and take into account any implications that may arise from the Human Rights Act 1998. Under the Act, it is unlawful for a public authority such as South Holland District Council to act in a manner that is incompatible with the European Convention on Human Rights. The Authority is referred specifically to Article 8 (right to respect for private and family life) and Article 1 of the First Protocol (protection of property).

It is not considered that the recommendation in this case interferes with local residents' right to respect for their private and family life, home and correspondence, except insofar as it is necessary to protect the rights and freedoms of others (in this case, the rights of the applicant). The Council is also permitted to control the use of property in accordance with the general public interest and the recommendation is considered to be a proportionate response to the submitted application based on the considerations set out in this report.

8.0 RECOMMENDATIONS

8.1 **That a certificate of lawfulness be issued for the proposed use, subject to those conditions listed in Section 9.0 of this report and the applicant entering into a Unilateral Undertaking to restrict the Use of the Property to three days a week between the hours of 10am and 4pm excluding Sundays and Bank Holidays, as well as restricting the Use to certain parts of the Property.**

9.0 CONDITIONS

1. Schedule 1 - Description of Use or Operation

Sale of bric-a-brac on a charitable basis for no more than three days a week between the hours of 10.00am and 4.00pm excluding Sundays and Bank Holidays.

Schedule 2 - Land Specified

90 Boston Road South, Holbeach (as outlined in red on the attached plan)

Reason for determining the use, operations or other matters to be lawful:

The use specified above is not considered to amount to a material change of use and is incidental to the enjoyment of the dwellinghouse. It therefore does not require planning permission.

2. Notes:

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 as amended. It certifies that the use, operations or matter specified in Schedule 1 taking place on the land described in Schedule 2 was or would have been lawful on the date of the application, and thus was not or would not have been liable to enforcement action under Section 172 of the 1990 Act on that date.

This Certificate applies only to the extent described in Schedule 1 and to the land specified in Schedule 2 and on the attached plan. Any use, operation, or other matter which is materially different from that described, or which relates to other land, may render the owner or occupier liable to enforcement action. The lawfulness is only conclusively presumed where there has been no material change in any relevant matter before the use or operations are begun.

Background papers:- Planning Application Working File

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Appendices attached to this report:

Appendix A Plan A


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