Appeal Decisions

Site visit made on 14 March 2017

by R J Jackson BA MPhil DMS MRTPI MCMI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 29 March 2017

Appeal A
Ref: APP/M9584/W/16/3146517
Wingate House, 51 Warton Road, Stratford, London E15 2JY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Schedule 2, Part 3, Class O of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
- The appeal is made by Mr David Halpern against the decision of London Legacy Development Corporation.
- The application Ref 15/00386/PNCOU, dated 30 July 2015, was refused by notice dated 25 September 2015.
- The development proposed is conversion of ground, first, second and third floors from existing B1 office floorspace to form 23 self contained flats.
- This decision supersedes that issued on 27 July 2016. That decision on the appeal was quashed by order of the High Court.

Appeal B
Ref: APP/M9584/W/16/3146518
Wingate House, 51 Warton Road, Stratford, London E15 2JY

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval required under Schedule 2, Part 3, Class O of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended).
- The appeal is made by Mr David Halpern against the decision of London Legacy Development Corporation.
- The application Ref 15/00387/PNCOU, dated 30 July 2015, was refused by notice dated 25 September 2015.
- The development proposed is conversion of first, second and third floors from existing B1 office floorspace to form 18 self contained flats.
- This decision supersedes that issued on 27 July 2016. That decision on the appeal was quashed by order of the High Court.

Decisions

Appeal A

1. The appeal is allowed.

Appeal B

2. The appeal is allowed.

Application for costs

3. An application for costs was made by Mr David Halpern against the London Legacy Development Corporation (the LLDC). This application is the subject of a separate Decision.

Procedural matters

4. The two appeals relate to the same building. The only difference between them is that in Appeal A the whole building would be converted to dwellinghouses, while in Appeal B this would be limited to the upper three floors. The main issues in the two appeals are the same.

5. The application form for the application which became Appeal A described the development as "Conversion of ground, first, second and third floors from existing B1 office floorspace to form 23 self contained flats", and then went on to make some comments as regards transport and highways, contamination and flooding. There was a covering letter, dated 30 July 2015, which set out the application drawings. This included drawing No 4241/P 03; this drawing shows 24 flats.

6. Under paragraph W.(2) an application for a prior approval must be accompanied by "a written description of the proposed development" and "a plan indicating the site and showing the proposed development". The LLDC argues that because these were inconsistent the application was not valid and it was not until 22 September 2015 when a revised plan, drawing 4241/P03A, showing 23 flats, that this was resolved. I will deal with the question of validity below. However, for the purposes of clarifying that applied for I am satisfied that the proposal is for 23 flats as that was set out on the application form.

7. Although the two appeal forms indicated that the appeals were against the refusal of prior approval of permitted development rights, the grounds of appeal in respect of the second to fourth reasons for refusal dealing with transport and highways, contamination and flooding were, notwithstanding the issuing of two decision notices dated 25 September 2016, that the LLDC had not, in fact, notified the applicant of its decisions within the appropriate period and thus deemed consent had been granted. I deal with this as a main issue.

8. The originally enacted Town and Country Planning (General Permitted Development) (England) Order 2015, which was in force when the application was made, was amended as from 6 April 2016. This made permanent the right for the change of use from Class B1(a) office to residential and subject to a condition that, where permitted, any change of use must be completed within a period of 3 years starting with the prior approval date, rather than by 30 May 2019.

Main Issues

9. The main issues are:

- whether the building was last used as an office within Class B1(a) at the relevant time, and thus, whether, subject to the prior approval process, the proposal would be permitted development; and
- whether the LLDC notified the then applicant of its decision within the relevant period.

Reasons

10. The appeals property is a vacant building, which has been the subject of vandalism, located on the junction of Warton Road and Bridgewater Road with a waterway, known as the Waterworks River, to the west. It has accommodation over four floors.

How last used

11. The provisions of Class O of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO) allow the change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) to a use within Class C3 (dwellinghouses) of the Schedule to the Town and Country Planning Use Classes Order 1987 (as amended) (the UCO). Development is not permitted by Class O if, amongst other criteria, "(b) the building was not used for a use falling within Class B1(a) (offices) … on 29th May 2013" or if it was not in use on that date (but had previously been used), when it was last used.

12. There has been much discussion as the standard of proof required to show whether the building was last used as an office falling within Sub-class B1(a) for the purposes of the GPDO. Section 191 of the Town and Country Planning Act 1990 (as amended) (the 1990 Act) deals with certificates of lawfulness of existing use of development (a CLEUD). To obtain a CLEUD it is clear that the standard of proof is one based on the balance of probabilities. Sub-Section 191(6) goes on to state "the lawfulness of any use, operations or other matter for which a certificate is in force under this section shall be conclusively presumed". Thus the grant of a CLEUD on the balance of probabilities shows the use conclusively; the terms "balance of probabilities" and "conclusive" in this area are therefore synonyms.

13. The main purpose of the UCO is to indicate what changes of use, whether material or not, would not represent 'development' under Section 55(2)(f) of the 1990 Act. However, it is also used for the purposes of the GPDO to define uses. Sub-class B1(a) is defined in the UCO as "as an office other than a use within class A2 (financial and professional services)". Class A2 is defined as financial, professional (other than health or medical services) or any other services which it is appropriate to provide in a shopping area, in all cases "where the services are provided principally to visiting members of the public".

14. Thus a use falling within the term "office" in common language could fall within either Class A2 or Sub-class B1(a). For this reason importing a meaning from other sources into planning legislation unless specifically provided for could, and does, lead to confusion. Thus the term "office and premises" used in the appeal documentation in relation to the Rating List or a National Non-Domestic Rate Bill cannot be conclusively relied upon, as it could equally apply to a use falling within either Class A2 or Sub-class B1(a).

15. The building was granted planning permission for an office building in 1959. On the current applications forms, the then applicant indicated that the building was last used on 1 January 2000. However, the appeal documentation included a Statutory Declaration dated 13 March 2016 made by the appellant. The Statutory Declaration states that the ground floor was rented out until 1995, the first and second floors, separately, until 1997 and the third floor until 1996. The applicant declares that he visited the property on an occasional

basis between 1985 and 1997 and that each time the relevant floors were being used as offices. The Statutory Declaration goes on to state that following acts of vandalism post 1997 the building was made secure and it was not possible for it to be occupied for any use. That there were leases in relation to second and third floors which extended to September and November 1998 does not necessarily mean that the building was actually occupied or in use. As a Statutory Declaration I am able to give this evidence significant weight. The appellant in January 2017 accepted an error was made in stating on the applications forms that the last lawful use of the building was on 1 January 2000[1].

16. The Statutory Declaration sets out the companies who occupied the building but the LLDC asserts that the nature of their businesses does not necessarily show that the uses were as offices under Sub-class B1(a). A company may have buildings on more than one site or many buildings on a single site where the use of those buildings would be ancillary to a principal use[2]. Where the buildings are disparate, subject to any evidence to the contrary, it is more likely (that is satisfactorily shown on the balance of probabilities) that each use would be a primary use in its own right. Given the weight I have given to the Statutory Declaration, unless the occupation of the individual floors was by a company using it for a use with Class A2 it is likely that the use fell within sub-class B1(a).

17. The LLDC seeks to show that the last occupiers of the first and second floor, through their names "Knight Financial Limited" and "Rodal Investments Limited", were involved within the financial services industry. However, to fall within Class A2 "the services are provided principally to visiting members of the public". That a business had visitors does not mean that the use fell within Class A2, the service has to be provided principally to visiting members of the public. Provided that the services were not principally to visiting members of the public an office use providing financial of other similar services would fall within Sub-class B1(a).

18. Given these uses were on the upper floors of the building and have extensive floor areas and, notwithstanding the recent significant redevelopment of the area more generally in recent years due to the London Olympic and Paralympic Games and otherwise, it is set some distance from a shopping street where members of the public may be passing and thus be attracted to visit the uses. Any use is unlikely to be principally for visiting members of the public.

19. I have no evidence that the occupation of any of the other floors fell outside Sub-class B1(a), whether in another use class or as a *sui generis* use. While Honeywell Control Systems Limited may have been involved in manufacturing there is no evidence that such manufacturing took place on this site. Similarly, Universal Communications Limited was a market research firm, but there is no evidence that the public visited the site. The uses on this site were primary uses. I am therefore satisfied on the evidence in front of me that when each floor of the building was last in use it was for a use falling in Sub-class B1(a).

20. There is no dispute, and I have no evidence to counteract this, that the proposed change of use would be prevented by any other of the restrictions set

[1] Statement on behalf of appellant dated January 2017
[2] See the last sentence of paragraph reference ID: 13-010-20140306 to the national Planning Practice Guidance (the PPG).

out in paragraph O.1, and that thus, subject to the prior approval process, I am satisfied that the changes of use would represent permitted development.

The prior approval process

21. The applications were made electronically and are dated 30 July 2015. However, they were not sent on that day. A covering email in respect of Appeal A, attaching the application form and accompanying documentation was sent timed at 09:41 hours on 31 July 2015. This was a Friday. This specifically states "A cheque for £80 for the requisite fee will be sent under separate cover in today's post". A second, similar, email was sent in respect of Appeal B at 10:41 hours on 31 July 2015 and contained the same quote.

22. Paragraph W of Schedule 2, Part 3 of the GPDO sets out the procedure for prior approval under Part 3, including for Class O. This sets out that the application must be accompanied by various items "together with any fee required to be paid". Until all the relevant documentation is received, in this case by the LLDC, an application is not validly made. By sending the application electronically the applicant was agreeing that the applications were being dealt with through electronic communication.

23. Under Article 2(9) of the GPDO where electronic communication is used if it is received outside the recipient's business hours it is taken to have been received on the next working day, which is defined as not including a Saturday or Sunday. Although the cheques with the relevant fees were not sent electronically they could not have been received on Friday 31 July as they were sent in that day's post; the next working day was Monday 3 August 2015.

24. The appellant argues that the cheques would have been received in the ordinary course of post, and states they were sent first class, and thus received on Saturday 1 August. However, by using electronic communication he has taken himself within Article 2(9) of the GPDO and thus the requisite fees were deemed not to be received until the next working day; that is Monday 3 August.

25. Paragraph W.(11) of Part 3 of the GPDO states that the development must not begin before the occurrence of one of three events; receipt by the applicant from the local planning authority that prior approval is not required, receipt by the applicant from the local planning authority that prior approval is given, or "the expiry of 56 days following the date on which the application under sub-paragraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused" [my emphasis][3].

26. The LLDC then argues that additional information was submitted in respect of both the then applications on 7 and 21 September 2015, and in respect of the application that has been become Appeal A on 22 September. Thus it asserts that all the necessary information needed under paragraph W.(2) of Part 3 of the GPDO was not received until 22 September in respect of the application

[3] It should be noted that this is different from the prior approval provisions under Part 16 of Schedule 2 of the GPDO, Communications, where the timetable is "within a period of 56 days beginning with the date on which they [the local planning authority] received the applicant's application" (see paragraph A.3(7) of Part 16 of Schedule 2 of the GPDO) referred to by the appellant in his reference to the case of *Walsall Metropolitan Borough Council v Secretary of State for Communities and Local Government* [2012] EWHC 1756.

that is now Appeal A and 21 September in respect of the application that became Appeal B.

27. In respect of the Appeal A application the information submitted on these dates consisted of, on 7 and 21 September, information to support the contention that the building had last been used as offices falling within Sub-class B1(a) as well as a revised 'covering letter' used to support the application. The only material difference between the two covering letters was an amendment to the number of residential units being proposed, with the original letter indicating that this was for 23 residential units and the amended letter indicating it would be 24.

28. A "correct plan"[4] was submitted on 22 September 2012 showing revised floor plan layouts and 23 dwellings, and I have dealt with the nature of the application above. At the time the application was submitted there was no requirement to indicate as part of an application the net increase in dwellinghouses proposed by the development, and thus this does not go to the question as to whether the application as originally submitted met the necessary legislative requirements set out in paragraph W.(2). I am therefore satisfied that this application was validly received on 3 August 2015.

29. In respect of Appeal B the additional information related solely to support the contention that the building had last been used as offices falling within Sub-Class B1(a). Again this did not go to the question as to whether the application as originally submitted met the necessary legislative requirements set out in paragraph W.(2). Again, I am therefore satisfied that this application was validly received on 3 August 2015.

30. This means that for these purposes Monday 3 August was 'Day Zero', Tuesday 4 August was 'Day One', and so on. Using this formula 'Day Fifty-Six' was Monday 28 September 2015 and provided the LLDC notified the then applicant that prior approval was required and refused by the close of the recipient's business hours on that day, then deemed approval did not occur.

31. The LLDC sent two letters dated 17 August 2015 to the then applicant, one relating to each application. These letters both indicated that "if we have not made a decision by 27-Sep-2015, you have a right of appeal to the Secretary of State". However, the actions of a local planning authority cannot override statute. The legislation, as set out above, makes clear that that the period for determination was 56 days following the receipt, and for the reasons set out above this was 28 September. I therefore am satisfied that the two letters do not alter the date by when the LLDC needed to give written notice of its decisions.

32. There is no prescribed format for written notice of a decision on a prior approval application; there is no equivalent provision to Article 35 of the Town and Country Planning (Development Management Procedure) (England) Order 2015 (as amended) setting out the information which must be included as part of the decision.

33. At 09:16 hours on 28 September an officer of the LLDC sent an email to the appellant stating "Both Prior Approval applications were determined on Friday. I'm afraid that, once again, we determined that Prior Approval be required and

[4] Drawing 4241/P03A

refused. I expect the decision notices to be issued today." In the event the formal decisions were not sent until 30 September. For the application that has become Appeal A under cover of an email timed at 14:40 hours. I have been provided with no equivalent email for the application that has become Appeal B but it is not disputed that it was not sent until 30 September.

34. The LLDC realised that the legislation referred to in the heading of the decision notices (which were dated 25 September 2015) was incorrect and by email timed at 17:00 hours on 30 September issued a revised decision notice, also dated 25 September 2015. While it is clear it is not possible to issue a revised decision notice that the two decisions were issued within business hours on the same day means that there is no adverse effect from this. It is clear each purports to be a decision notice requiring and refusing prior approval. However, these emails were sent outside the 56 day period and on their own would not have been notification of the decisions within the relevant period.

35. The issue is therefore whether the email of 09:16 hours on 28 September 2015 represented a formal notification of the decision of the LLDC to require prior approval and to refuse it.

36. The email was signed with a first name only of the writer without giving his position within the LLDC or whether he had authority to make the statement. There is nothing to say under what authority the notification was being made, nor, specifically, did it refer to both of the applications, although this could be inferred from the overall email chain of which the email formed part. Given the legal importance of a formal decision notice it is imperative that this is clearly set out. A formal decision refusing approval needs to explain why the decision was being made as it was, and the text of the email does not do this. Looked at objectively I conclude that the email cannot represent the formal decisions of the LLDC notified to the applicant.

37. That being the case the LLDC then goes on to argue that if, and as is the case here, the appellant has not begun the development applied for the LLDC is entitled to issue a decision which should be complied with.

38. This is firstly based on a contention that under paragraph W.(11) development must not begin until one of three occurrences. By 29 September 2015, that is the date following the expiry of the 56 days referred to in sub-paragraph (c), none had occurred. At that point planning permission had been deemed to be granted in accordance with Article 3(1) of the GPDO. Paragraph W.(12), requiring the development to be carried out in a certain way, only applies where prior approval is required within the time period set out in paragraph W.(11). As that did not happen paragraph W.(12) is not engaged.

39. The LLDC also refers to the case of *Keenan v Woking Borough Council*[5] and two appeal decisions[6] in support of this contention. However, in these cases the developments in question were not permitted development of themselves, which is a different situation to that here where I have found above that, subject to the prior approval process, the developments would be permitted development.

40. That being the case the LLDC failed to notify the then applicant of its decisions within the relevant period and deemed permissions have been granted and it is

[5] [2016] EWHC 427 (Admin)
[6] APP/A2470/X/15/3005722 and APP/A2470/W/15/3002788

not necessary to consider whether prior approval was required or should be granted.

Conclusion

41. For the reasons given above, and taking all other matters raised into account, I conclude that the appeals should be allowed.

R J Jackson

INSPECTOR