
Appeal Decisions

No Site visit made

by Simon N Hand MA

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

Decision date: 18 May 2017

Appeal Ref: APP/M4510/X/16/3164417

Unit 5, Newcastle Shopping Park, Fossway, Newcastle upon Tyne, NE6 2UJ

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by M & G Real Estate against the decision of Newcastle-upon-Tyne City Council.
 - The application Ref 2016/0458/01/LDC, dated 14 March 2016, was refused by notice dated 1 July 2016.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended.
 - The use for which a certificate of lawful use or development is sought is open A1 retail use as defined by the Town and Country Planning (Use Classes) Order 1987 (as amended)
-

Other Appeals

1. Identical appeals have been submitted for other units at the retail park, brief details of each are given below.

APP/M4510/X/16/3164414; Unit 5A; application reference 2016/0459/01/LDC, dated 14 March 2016 refused on 1 July 2016.

APP/M4510/X/16/3164415; Unit 5B; application reference 2016/0451/01/LDC, dated 14 March 2016 refused on 1 July 2016.

APP/M4510/X/16/3164424; Units 6A & 6B; application reference 2016/0452/01/LDC, dated 14 March 2016 refused on 1 July 2016.

APP/M4510/X/16/3164418; Unit 7; application reference 2016/0453/01/LDC, dated 14 March 2016 refused on 1 July 2016.

APP/M4510/X/16/3164416; Unit 8; application reference 2016/0454/01/LDC, dated 14 March 2016 refused on 1 July 2016.

APP/M4510/X/16/3164419; Unit 9; application reference 2016/0455/01/LDC, dated 14 March 2016 refused on 1 July 2016.

APP/M4510/X/16/3164420; Unit 10; application reference 2016/0456/01/LDC, dated 14 March 2016 refused on 1 July 2016.

APP/M4510/X/16/3164421; Unit 11; application reference 2016/0457/01/LDC, dated 14 March 2016 refused on 1 July 2016.

Decisions

2. The appeals are dismissed. For the avoidance of doubt this includes all the appeals listed in paragraph 1 above as well as this appeal, references as follows:- 3164414, 3164415, 3164416, 3164417, 3164418, 3164419, 3164420, 3164421 and 3164424.

Main Issues

3. Whether the condition attached to the latest planning permission for the retail park is so worded as to exclude the operation of the Use Classes Order.

Reasons

4. A brief planning history of the retail park is relevant. In 2001 the Secretary of State granted planning permission for a "*mixed use development (Classes A1, A3, B1, C1 & D2)*", with a condition, No 20, which said "*the non-food retail premises shall not be used for the sale of food for consumption off the premises other than confectionary*". Various changes were made to the planning permission in subsequent years but the condition was retained unaltered, but now numbered 21.
5. In April 2011 the Council granted permission for a variation to condition 21, which became number 2 and read "*no more than 2,259 sqm of net floorspace from within unit 5 only shall be used for the sale of food for consumption off the premises. The retail premises other than Unit 5 shall not be used for the sale of food for consumption off the premises other than confectionary*". In other words the new occupier of unit 5, ASDA, was allowed to sell food for consumption off the premises from a defined area of floor space while the other units were still bound by the restriction to confectionary only.
6. In January 2012 the Council granted the final variation to this condition so that it now reads "*no more than 2,259 sqm of net floorspace from within unit 5 only shall be used for the sale of food for consumption off the premises. The other premises other than Unit 5 shall not be used for the sale of food for consumption off the premises other than confectionary unless ancillary to the principal permitted authorised use. The floor space taken up by ancillary food sales shall not exceed 15% of the gross floor space of any individual unit*".
7. The appellant argues that because the condition does not specifically exclude the operation of the Use Classes Order, then in effect Unit 5 can operate as an unfettered A1 use. The appellant relies on the Bolton Gate¹ appeal decision and a number of court cases of which three are particularly relevant, Royal London², Trump³ and Dunnett Investments⁴.
8. Dunnett Investments is the most recent of the judgements which was even more recently upheld in the Court of Appeal. However, neither party refers to the Court of Appeal judgement so I shall restrict myself to the High Court judgement. In that case the Hon Mrs Justice Patterson helpfully summarised the latest state of the law:

¹ APP/N4205/X/13/2206789 Issued 11 February 2015

² Royal London Mutual Insurance Society Ltd v SSCLG & Lewisham LBC [2013] EWHC 3597 Admin

³ Trump v Scottish Ministers [2015] UKSC 74

⁴ Dunnett Investments Ltd v SSCLG and East Dorset District Council [2016] EWHC 534 (Admin) [The High Court Case] & [2017] EWCA Civ 192 [The Court of Appeal Case – not referred to by the appellant]

- i) Planning conditions need to be construed in the context of the planning permission as a whole;
 - ii) Planning conditions should be construed in a common sense way so that the court should give a condition a sensible meaning if at all possible;
 - iii) Consistent with that approach a condition should not be construed narrowly or strictly;
 - iv) There is no reason to exclude an implied condition but, in considering the principle of implication, it has to be remembered that a planning permission (and its conditions) is "a public document which may be relied upon by parties unrelated to those originally involved";
 - v) The fact that breach of a planning conditions may be used to support criminal proceedings means that "a relatively cautious approach" should be taken;
 - vi) A planning condition is to be construed objectively and not by what parties may or may not have intended at the time but by what a reasonable reader construing the condition in the context of the planning permission as a whole would understand;
 - vii) A condition should be clearly and expressly imposed;
 - viii) A planning condition is to be construed in conjunction with the reason for its imposition so that its purpose and meaning can be properly understood;
 - ix) The process of interpreting a planning condition, as for a planning permission, does not differ materially from that appropriate to other legal documents.
9. These principles are straightforward and clear especially "(ii) *planning conditions should be construed in a common sense way so that the court should give a condition a sensible meaning if at all possible*". In my view the condition is unequivocal, there shall be no food sales from the shop units except as described in the condition. No other interpretation of the condition is possible; it seems to me to be entirely unambiguous.
10. The appellant argues that regardless of the wording, because the Use Classes Order is not mentioned it cannot be excluded and no reasonable person would assume it was excluded. I think this rather misses the point; that not many "reasonable people" would have even heard of the Use Classes order, never mind understood its application in this instance. A reasonable person would simply understand the condition to be controlling food sales.
11. The Dunnett case involved a condition which sought to prevent a material change of use of an office block to any other use. That condition expressly excluded the operation of the Use Classes Order but did not mention the GPDO, which most recently has allowed changes of use from office to residential. It was accepted in Trump that wording can be implied by a condition and in Dunnett, Justice Patterson accepts this in her fourth principle. She goes on to consider whether the GPDO can be excluded from the condition in question despite there being no mention of it and decides it can. It was clear that the final sentence of the condition "*and for no other purpose whatsoever without*

express planning consent from the local planning authority first being obtained" could be given no ascertainable meaning unless it was to exclude the operation of the GPDO, otherwise an express planning consent would not be necessary. Although that judgement considers the GPDO the parties in this case accept that the same principle applies to the UCO.

12. In my view the condition subject to this appeal does not require a specific tailpiece to reinforce the view that the UCO is excluded as that is the whole point of the condition. If it did not exclude the operation of the UCO it would be entirely pointless as Class A.1(a) *Shops* refers to the the retail sale of goods other than hot food and (d) refers to the sale of sandwiches or other cold food for consumption off the premises and it is just these sales the condition seeks to control. In my view the condition must exclude the operation of the UCO otherwise it would be entirely without any purpose.
13. I am supported in this view by the inclusion of just such a condition in Annex A of Circular 11/95 *The Use of Conditions*. Although the Circular is no longer extant Annex A is still current advice and contains the model condition "*The premises shall not be used for the sale of food for consumption off the premises other than confectionery*". A variation of this is the original condition used by the Secretary of State when granting planning permission for the retail park in 2001. It was clearly the Secretary of State's view in 2001 that such a condition could successfully prevent the sale of food without reference to the UCO, and presumably this is still the case as the condition is still used as a model in Annex A and presumably is attached by planning authorities across England to retail permissions when considered necessary.
14. Furthermore the courts have made it clear that a condition should be read along with the permission and the reasons for attaching it (principle (viii) from Dunnett). In this case the Inspector who wrote the report that formed the basis for the Secretary of State's decision considered it necessary to protect the vitality and viability of the Shields Road District Centre and so a condition restricting food sales was required. This seems to me to be an appropriate and specific purpose which the condition sought to achieve. Although the condition has been modified over the years to allow some food sales that purpose remains a concern of the Council today and is still fulfilled by the condition.
15. The appellants point to the Bolton Gate decision where the opposite conclusion appears to have been reached. However, that decision was issued before the Dunnett case and the Inspector relied on the distinction between the phrasing of the condition before him and that in the Royal London case, the most recent court judgement at that time. In the latter case the Inspector considered the phrase "shall be for non-food sales only" was clearer and more emphatic than the Bolton Gate condition which said "shall not be used for the sales of..." and then listed various items, including food. I am not convinced the Inspector would have reached the same decision had he applied principles (ii), (iii) and (iv) from the Dunnett case. He also found the condition to be generally applied by the Council and the reason was simply to conform to its retail policy in the UDP. He felt such a non-specific reason was insufficient to imply a restriction on the UCO, which is quite different from the appeal before me.
16. Consequently, I consider that the condition is clear and specific in its construction and was attached for limited and sensible reasons. It can only be read so as to preclude the operation of the UCO as far as the sale of food is

concerned, within the terms set out in the condition, and I shall dismiss the appeals and refuse to issue a lawful development certificate as applied for.

Simon Hand

Inspector