



Appeal Decision

Inquiry held on 4 July 2017

Site visit made on 3 July 2017

by Mr A U Ghafoor BSc (Hons) MA MRTPI

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

Decision date: 27 July 2017

Appeal Ref: APP/G5180/X/16/3154436

Office Block at the Bronze Works, Kangley Bridge Road, Lower Sydenham SE26 5AY

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 [‘the Act’] against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development [‘LDC’].
 - The appeal is made by Mr Dominic Hill on behalf of DJ Hill & NJ Hill against the Council of the London Borough of Bromley.
 - The application Ref DC/15/05049/ELUD is dated 16 November 2015.
 - The application was made under section 191(1)(a) of the Act.
 - The use for which a certificate of lawful use or development is sought is described in the application form as: *This application is to certify that the office block is a B1(a) use and not ancillary to wider commercial use of the site. The site apart from the office block is made up of 15 separate commercial units all of which have tenants.*
 - The Inquiry sat for one day.
 - All of the evidence was affirmed.
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Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the use existing on the application date which is considered to be lawful.

Preliminary matters

2. This appeal was made against the Council’s failure to determine an application for a LDC within the prescribed period. The appeal documents were received on 13 July 2016. Subsequently, on 15 July 2016, the Council made a formal decision not to issue an LDC for the following reason:

‘Insufficient evidence has been provided to substantiate that the use of the front building would fall within Class B1(a) use and would not form part of a wider commercial use of the site. Insufficient evidence has been submitted to substantiate that the front building has been used as such continuously for a period of 10 years and as such the existing use is not considered to be lawful’.

Class B1(a) refers to Part B, Class B1 in the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended [‘the UCO’].

The appeal parties agreed I should evaluate and determine this appeal on the basis that the Council has refused to issue a LDC.

3. The applicant must precisely describe what is being applied for. Section 191(4) of the Act permits the Council to modify the terms of an application so as to accord with the facts and evidence. The refusal notice, in the first schedule, refers to an amended description in the following terms: '*Use of office block as non-ancillary self-contained offices falling within Class B1(a)*'. It is apparent to me that the appellant seeks a certificate declaring that the office use of the front building fell within Class B1(a) in the Schedule to the UCO on 16 November 2015. There is broad agreement that I should adopt this description.
4. At the Inquiry, an application for costs was made by the appellants against the Council. This application is the subject of a separate decision.

Inspector's reasons

5. The issue is whether the office use was lawful on the date of the application. For the purposes of the Act, a use is lawful at any time if no enforcement action may then be taken in respect of the use, due to the passage of time. In the case of any other breach of planning control, no enforcement action may be taken after the end of the period of 10-years beginning with the date of the breach¹.
6. In this appeal the onus of proof is firmly on the appellant. In *Gabbitas*² the Courts have held that the relevant test of the evidence on matters such as an LDC application is the *balance of probabilities*. The applicant's own evidence does not need to be corroborated by independent evidence in order to be accepted. If the Council has no evidence of its own, or from others, to contradict or otherwise make Mr Hill's version of events less than probable, there is no good reason to dismiss the appeal, provided his evidence alone is sufficiently precise and unambiguous.
7. The statement of common ground³ sets out a description of the Bronze Works site and a lengthy planning history; I will refer to the most pertinent aspect of that history. Before the Bronze Works site was purchased, Mr Hill's parents operated Factormark Limited, which was a business that imported and exported dental products from a commercial site at Penge. In addition to that enterprise the family decided to establish two separate businesses: Tower Dental Supplies and Red Apple Ltd selling products to customers on a wholesale and retail basis. Expansion of commercial operations meant that the site at Penge was too small. Subsequently all three companies relocated to the Bronze Works site in August 2000, which comprised warehouses and a three-storey office building situated along the front (facing Kangley Bridge Road); the LDC application relates to the latter.
8. There is broad agreement that the Bronze Works site was occupied for industrial and commercial purposes with ancillary office prior to August 2000. I concur with the appeal parties that the character of that type of activity falls within Class B2 in the Schedule to the UCO⁴. The history shows that planning permission was

¹ Section 191(1)(2) and 171B of the Act.

² *Gabbitas v Secretary of State for the Environment* [1985] JPL 630 reviewed in *Ravensdale Limited v Secretary of State for Communities and Local Government* [2016] EWHC 2374 (Admin).

³ Signed and dated 20 June 2017.

⁴ Use for the carrying on of an industrial process other than one falling within class B1. Article 3(4) states where land on a single site or on adjacent sites used as parts of a single undertaking is used for purposes consisting of or including purposes falling within classes B1 and B2 in the Schedule, those classes may be treated as a single class in considering the use of that land for the purposes of this Order, so long as the area used for a purpose falling within class B2 is not substantially increased as a result.

granted for extensions and alterations to the factory and the erection of an additional storey to the office building in 1950.

9. The Bronze Works site layout changed dramatically in about August 2000 when it was purchased by the Hill family as there was more space than the three businesses required. The unchallenged evidence is that alterations resulted in the creation of Units 1 to 11, which were occupied by small to medium enterprises on a commercial lease. A separate and large warehouse located to the rear of the front building was physically subdivided and occupied by Tower Dental and Red Apple Ltd. Factormark occupied the front building.
10. The warehouse units to the rear of the front building contained separate office suites, staff toilets and kitchen facilities. These two units were used as depositories and bulky items were stored on racks. Dental products would arrive in shipping style containers and forklift trucks and specialist plant and machinery would be utilised to store goods on pallets. Members of staff employed by Tower Dental and Red Apple would pick and pack products ready for despatch to customers by mail order or delivery vehicle. Each unit contained separate offices where sale staff was permanently based. Mr Hill and Mr Jones' precise testimony is that there was no land-use link between the use of the warehouse units and the front office building occupied by Factormark.
11. As I have already said elsewhere, Factormark's activity mainly comprised the import and export of dental products sourced from manufacturers and supplied directly to customers. Mr Hill's evidence is that the company did not require a storage facility, which is plausible given the nature of the enterprise. He maintains that each floor of the front building included open plan office suites, cubicles and individual rooms. It contained its own toilets and kitchenettes; there was a designated reception area. Office furniture, fittings, fixtures and machinery usually found in office-like setups was in existence. Further, 20 to 30 people used the building as their place of work during the week. In addition, Mr Jones said that his firm managed the company's payroll. He told the Inquiry that meetings would frequently be held in the building. Both witnesses precisely confirmed that staff and visitors would use the adjacent car park and it was separate from the service area to the rear warehouse. The office-based activity generated frequent vehicular movements. The company ceased trading in July 2009 but the evidence shows that the three-storey building was only used for commercial office purposes during its occupation.
12. In my assessment, while there were common management structures between the family's business interests, as a matter of fact and degree, I find that there was a significant degree of disconnection between the use of Units 1 to 11, the separate warehouse units and the front building. This is because of the nature and scale of the activities taking place within each defined area. In practice, the rearrangement of the Bronze Works site layout and configuration at the turn of the Century resulted in the creation of Units 1 to 11, two separate warehouse units and a front office building each constituting a self-contained planning unit, due to the considerable degree of physical and functional separation. From August 2000 onwards the use of the front building for office purposes was characteristic of a use falling within Class B1(a) in the Schedule to the UCO⁵.

⁵ Applying the principles established in *Burdle and Williams v SSE and New Forest DC* [1972] 1 WLR 1207.

13. The Council's second submission is that, even if Factormark's occupation amounted to a primary office use, there was a material break in the continuity of the use. This is because the company ceased trading by July 2009 and the front building was vacant. It remained unoccupied until March 2012 when a graphic design firm, Ngwena Ltd, took up occupation as an office until August 2014⁶. Ngwena Ltd went into financial difficulties falling into rent arrears and was subject to a High Court possession order. In October 2013 Mr Hill applied for the conversion of the front building from office to residential use pursuant to the Town and Country Planning (General Permitted Development) Order 1995 as amended⁷. Alterations to the front building have been made pursuant to that approval but immediately ceased when the Council raised concerns about the building's last use.
14. The Council say immunity could not be achieved by at least August 2010, due to a material break in the continuity of use. If the use ceases and is then recommenced, the 10-year period required for immunity begins with the act of the recommencement. Therefore, for a use to obtain immunity from enforcement action it has to be exercised continually and without significant interruption for the whole of the 10-year period. There is a difference between '*continuity of use*' and '*continuity of occupation*'. Whilst continuity of occupation could equate to continuity of use, the absence of *continuity of occupation* [my emphasis] does not itself mean that the continuity of use has not been proved.
15. Now, it is plausible and reasonable that a property could be vacant and unoccupied over a period of time before the next tenant moves in. The front building was unoccupied for about two years and eight months before the next occupant moved in. That said, however, there is no evidence to make less than credible Mr Hill's claim that in August 2010 the building's internal and external layout remained unaltered. In fact it had been maintained as an office throughout the vacant period. The evidence presented shows that the front building had been available on a commercial lease for office use from July 2009. For example, the advertisement indicates details were given in the local press as well as on the Internet; the property was also marketed via a commercial estate agent at competitive rates. Further, a banner sign was attached to the building to this effect.
16. In cross-examination, the Council's witness conceded, in my view, correctly, that the marketing exercise satisfactorily showed a reasonable effort had been made to market the building as being available from July 2009 onwards. In my opinion, Ngwena Ltd occupation strongly suggests to me that the marketing exercise during the vacant period was sufficient and reasonable. I am aware of the prior approval application nonetheless there is no conclusive evidence to indicate that the front building had undergone a material change in its use during the unoccupied period. I am therefore persuaded there was a firm and strong intention to continue the office use despite the break in the physical occupation of the building.
17. In my assessment if the Council had considered there had been a MCU from ancillary office use to primary office use, and that it considered a breach of planning control had in fact taken place and it was expedient to take action, it

⁶ Statement of Common Ground at section 9(e).

⁷ Applied under the GPDO then in force. The Council's reference is 13/03598 granted December 2013.

could have taken enforcement action throughout the whole of the relevant 10-year period, but failed to do so. The office use was being exercised continually and without significant interruption. I am therefore satisfied that the scale of any non-occupation period did not amount to a material break in the continuous and active office use of the front building⁸.

18. On the balance of probabilities, I consider that sufficient evidence has now been provided to substantiate Mr Hill's claim that the office use of the front building fell within Class B1(a) in the Schedule to the UCO at the date of the LDC application. That use was instituted in August 2000 and it existed at least 10 years prior to the current application without significant interruption. On the particular facts and circumstances of this case, I find that, due to the passage of time, the office use was immune from enforcement action.
19. Even if an alternative view is to prevail and the Council's submission is correct, that is, that the front building's occupation and use by Factormark was functionally linked to the commercial/industrial use of the wider Bronze Works site, I am not persuaded that type of activity is substantially different from the use of the front building for office purposes. I am therefore of the opinion that, whichever way one scrutinises the evidence presented, it shows a continued office use. The nature, type and scope of that type of activity firmly falls within Class B1(a) in the Schedule to the UCO.

Conclusion

20. The case for the Council has been forcefully and elegantly put. However, for all of the reasons given above and having regard to all other matters raised, I reject the Council's submissions. I conclude that the deemed refusal to issue the LDC was not well-founded.
21. This appeal should therefore succeed and I have exercised the powers available to me under s195(2) of the Act to grant a certificate of lawful use in the terms stated in the certificate attached to this decision.

A U Ghafoor

Inspector

⁸ Applying the principles established in *Basingstoke and Deane BC v SSCLG & Stockdale* [2009] EWHC 1012 Admin; *JPL 1585* and *Swale BC v FSS & Lee* [2005] EWCA Civ 1568; [2006] JPL 886; *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226 and *Panton & Farmer v SSETR & Vale of White Horse DC* [1999] JPL 461.



Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 191
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND)
ORDER 2015: ARTICLE 39

IT IS HEREBY CERTIFIED that on 16 November 2015 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto edged and hatched in black on the plan attached to this certificate, was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

No enforcement action may be taken in respect of the use specified in the First Schedule, because the time for enforcement action has expired.

Signed

A U Ghafoor

Inspector

Date 27 July 2017

Reference: APP/G5180/X/16/3154436

First Schedule

Office use of the front building being a use falling within Class B1(a) in the Schedule to the Town and Country Planning (Use Classes) Order 1987 as amended.

Second Schedule

Office Block at the Bronze Works, Kangley Bridge Road, Lower Sydenham SE26 5AY.

NOTES

This certificate is issued solely for the purpose of Section 191 of the Town and Country Planning Act 1990 (as amended). It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule was lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 27 July 2017

by **Mr A U Ghafoor BSc (Hons) MA MRTPI**

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Not to scale



