Appeal Decision

Site visit made on 27 January 2020

by Andy Harwood CMS MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25 February 2020

Appeal Ref: APP/U5360/X/19/3231210
21-27 Millers Terrace, Hackney, London E8 2DP

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the Act) 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 Ms Weinberger against the decision of the Council of the London Borough of Hackney.
- The application Ref 2019/1439, dated 16 April 2019, was refused by notice dated 11 June 2019.
- 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 described as "B1 (a) - Office (other than A2)."

Decision

1. The appeal is dismissed.

Preliminary Matter

2. Access to the ground floor of the premises was not possible at the time of my site visit. Notwithstanding any current use of that part of the appeal site, this decision will be made on the basis of the evidence provided regarding the circumstances on the date that the application was submitted.

3. I have taken the description of the use from the application form. This refers to Class B1(a) of the Schedule to the Use Classes Order[1] (UCO). I will therefore consider the appeal on the basis that the appellant is seeking confirmation that use as offices, other than for financial and professional services, was lawful when the application was submitted.

Main Issue

4. The appeal relates to the refusal of an application for a LDC and turns on matters of law rather than planning merits. The main issue is whether the Council's decision to refuse the LDC was well-founded and the onus of proof is upon the appellant.

Reasons

5. The Act at s191(2)(a) and (b) sets out that uses and operations are lawful at any time if:

[1]The Town and Country Planning (Use Classes) Order 1987 (as amended)

i. No enforcement action may be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired of for any other reason); and

ii. They do not constitute a contravention of any enforcement notice then in force.

6. With respect to 'ii', there is no suggestion that the current use is in contravention of an enforcement notice. With respect to 'i', s171B sets out the time limits for taking enforcement action. In relation to the making of any material changes in the use of any buildings or other land, the time limit is 10 years. It is therefore necessary for the appellant in this case to demonstrate that the use has continuously taken place for the 10-year prior to the date of the application therefore since 16 April 2009. As referenced by the appellant, it has been held in Thurrock[2], that such use could only become lawful if it continued throughout the ten-year period to the extent that the local planning authority could have taken enforcement action at any time during that period. That case also references other authorities that clarify that if the use had already gained immunity due to continuing over an earlier period of 10 years, it would remain lawful unless it has been abandoned.

7. In 1984, deemed planning permission (11/9847) was granted to the Council under the provisions of the then applicable Town and Country Planning General Regulations 1976. This was issued with various conditions including, amongst others, that the use should only be carried out by the Council. Another condition requires that the community use should be terminated by 30 April 1987. There is no dispute that this development was implemented and that the community use may have continued in breach of the time limiting condition. No other planning permission is referred to or relied upon by the Council or the appellant. A letter is produced in evidence that indicates that in 1995 the Council at that time considered the "authorised" use of the premises was "industrial". This view may have been taken on the basis of the historic use prior to the probable implementation of the community use as documented in a letter from 1952.

8. After the expiry of a temporary period imposed by a planning condition, the continuation of the use does not normally amount to development even though it would be a breach of that condition. However, in terms of the evidence available in this case, these matters are not clear cut. It is not clear what use the building was put to, if any, between 1995 and before 2004 or the implications of that for any previous lawful use. I don't find the continued rating of the premises for community use assists in my deliberations because I am not made aware of what scrutiny the Valuation Office Agency applied.

9. On 28 May 2004, a lease was entered into which states that the premises or part thereof shall be used as offices. The period of the lease allowed potential use of the property for 15 years. It shows a clear intention to make the property available for those purposes but does not demonstrate what the actual usage was. Furthermore, the limitation within the lease for "offices" does not obviously rule out uses that may fall outside of that applied for and there is no apparent explicit reference to any class within the UCO. Other uses may well be carried out within what is generally described as an "office".

[2] Thurrock BC v SOS & Holding [2002], EWCA Civ 226

10. I also consider that the weight I can give to the intentions of the tenants who signed the lease, is set in context by another clause. Clause 23(i) of the lease seeks to ensure that the property does not operate a contravention of the Act. The appeal is based upon the appellant trying to demonstrate that there has been a breach of planning control and so it is not apparent whether the signatories to the lease were very aware of the workings of the Act.

11. Evidence submitted by the appellant of actual occupation and use of part of the first floor is in the form of an email from an architectural company who were there between 2012 and 2014. This is corroborated by information from Companies House. Such a practice would seem at face value to fall within the use being applied for. However, this does not demonstrate continual use for 10 years and does not confirm whether the use of the property over both floors was entirely within the same use. From what I could see of the building, it has clearly been fitted out in a manner typical of offices although it seems to me that there is also no reason why the same physical layout and decoration wouldn't suit other office-based uses.

12. The visit by a Council officer in 2018 prior to the submission of the application indicates that the property was being used by a number of what are described as "creative companies as office space". This was during the time of the 28 May 2004 lease. I have very little detail about the nature of the work being undertaken at that time. There is no evidence of whether the users of the property were conscious or informed regarding the nature of the limitations within the lease and so I cannot assume its terms were complied with.

13. The evidence from the Council is not sufficient to directly contradict that of the appellant. However I find that the appellant's evidence is not sufficiently precise and unambiguous to demonstrate, on the balance of probabilities, that the use as applied for has been continuously carried on for any 10 year period prior to the date of the application.

Conclusion

14. It appears to be less than probable from the evidence provided, that the use as applied for was carried out continuously throughout the property and for any period of 10 years prior to the application. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use as "B1 (a) - Office (other than A2)", was well founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

A Harwood

INSPECTOR