



Appeal Decision

Site visit made on 27 January 2020

by V Bond LLB (Hons) Solicitor (Non-Practising)

an Inspector appointed by the Secretary of State

Decision date: 26 February 2020

Appeal Ref: APP/H1705/X/19/3233369

Station Approach, Station Road, Whitchurch RG28 7ER

- 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 Penney Limited against the decision of Basingstoke & Deane Borough Council.
 - The application Ref 18/02393/LDPU, dated 16 July 2018, was refused by notice dated 31 May 2019.
 - The application was made under section 192(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 'use of the ground and first floors of the building at Station Approach, Station Road, Whitchurch, Basingstoke, Hants RG26 7EX [*sic*] for eleven (11) self-contained flats (Class C3) in accordance with details shown on the prior approval application received on 28 November 2017'.
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Decision

1. The appeal is dismissed.

Procedural Matter

2. The use for which a certificate of lawful use or development is sought, as described in my banner heading above, refers to an incorrect postcode for the appeal site. I have stated the correct postcode in my banner heading above, which is taken from the site address section of the application form.

Background and Main Issue

3. In November 2017 the appellant submitted an application to the Council seeking confirmation as to whether prior approval would be required for a change of use of the appeal building from light industrial use to 11 self-contained flats under Schedule 2, Part 3, Class PA of the Town and Country Planning (General Permitted Development) Order 2015 (GDPO). The plan then submitted showed though 12 flats. The application was given reference 17/04032/GPDLIN.
4. A letter was sent by the Council to the appellant dated 29 November 2017 stating that the application had been 'withdrawn' due to the gross floorspace of the building measuring more than 500 sqm, and as the proposal appeared to include external alterations. Following this letter, there was further correspondence between the Council and the appellant essentially related to

- the floorspace of the building, and so whether the proposal represented permitted development (PD) under Class PA.
5. No formal decision was ever issued in respect of the prior approval application. Consequently, the appellant sought to demonstrate through a lawful development certificate (LDC) application, which is the subject of this appeal, that prior approval was deemed to be granted.
 6. This is on the basis that Schedule 2, Part 3 paragraph W(11) of the GDPO states that development which is the subject of a prior approval application must not begin before either receipt of a written notice from the Council giving or refusing prior approval, or the expiry of 56 days following the date on which the application was received without the authority giving notification as to whether prior approval is given or refused.
 7. The Council contends though that the application was not validly made as the fee payable was not received and that the 56 day period did not therefore start to run. The Council is also of the view that the appeal building does not meet with the floorspace limitation contained within Class PA.
 8. Accordingly, the main issue is whether the Council's decision to refuse to issue a LDC was well-founded. This will turn on whether the prior approval application was validly made and so whether prior approval was deemed to be granted in the absence of a formal decision by the Council. If so, it will also be necessary to consider whether the proposed change of use would be PD under Class PA.
 9. The onus is on the appellant to make their case on the balance of probabilities. If there is no evidence to contradict or make the appellant's version of events less than probable, and their evidence alone is sufficiently precise and unambiguous, a LDC should be granted.

Reasons

Validity of prior approval application

10. Schedule 2, Part 3 paragraph W of the GDPO sets out the procedure for applications for prior approval under Part 3 of the GDPO – including those under Class PA.
11. Paragraph W(2) of the GDPO stipulates that the application for prior approval must be accompanied by, amongst other things, 'any fee required to be paid'. As outlined above, paragraph W(11) goes on to state that the 56 day period will run from the date on which 'the application under sub-paragraph (2) was received by the local planning authority'.
12. Thus, the 56 day period runs from when a valid application is received by the Council. Payment of the relevant application fee is required in order for an application to be validly made as payment of the relevant fee is a statutory requirement of paragraph W(2). Whether or not a prior approval application is validly made is an objective question of law and is not dependent upon whether or not the Council considers that it is validly made. The matter of whether payment was received is a question of fact.
13. As to the evidence on whether the fee payable was received by the Council, the appellant submits a sworn affidavit from the agent who submitted the prior

approval application. This confirms that the application fee was enclosed with the covering letter sent submitting the prior approval application, which was sent by first class post. This evidence weighs in favour of a finding that it is probable that the fee was received by the Council.

14. The affidavit acknowledges that the cheque has not been banked and the Council contends that the application was only submitted by email and that the cheque was not received. However, the fact that the cheque was not banked does not make it probable that it was not received – there could be other reasons for this. Equally, the fact that an application was submitted by email does not mean that it could not also have been submitted in the post (along with the payment of the fee). Indeed, the sworn affidavit referred to from the agent suggests otherwise in this case.
15. Further, there is no evidence before me that any correspondence from the Council during the 56 day period made any reference to non-payment of the fee. Indeed, following the initial letter from the Council dated 29 November 2017, the Council appeared to correspond with the appellant as if the application had been validly made by way of email exchange in relation to the floorspace issue and querying how the appellant wished to proceed with the application in the light of this. It seems probable that if the fee had not been received, the Council would have raised this matter at that stage.
16. As such, I have before me strong evidence in the form of a sworn affidavit that the payment was sent by first class post. There is no substantive evidence to render it probable that the cheque was not *received* by the Council, albeit that it was not banked. Further, the Council did not raise non-payment as an issue during the course of the application and entered into discussion on the detail of the proposal as if it were a validly made application.
17. Thus, on the available evidence and on the balance of probabilities, it seems more likely than not that the fee was received by the Council. Consequently, I find that the prior approval application was validly made in this respect and so a period of 56 days did elapse without the Council making a decision.
18. However, this does not of itself mean that the proposal would be lawful and so I turn to address now whether the proposed change of use would be permitted development (PD) under Class PA.

Gross floor space

19. Article 3(1) and Schedule 2, Part 3, Class PA of the GDPO grant planning permission for the change of use of a building and any land within its curtilage from a use falling within Class B1(c) (light industrial) of the Schedule to the Town and Country Planning (Use Classes Order) 1987 as amended (UCO) to a use falling within Class C3 (dwellinghouses) of that Schedule.
20. Paragraph PA.1 sets out the limitations on this Class of PD. The limitation in dispute is PA.1(d) which states that development is not permitted by Class PA if 'the gross floor space of the existing building exceeds 500 square metres'. There is no suggestion from either party that any of the other limitations in PA.1 or conditions in PA.2 would not be complied with and I have no reason to disagree with that approach.
21. In discussions/correspondence in relation to the prior approval application, there was some debate between the Council and appellant as to whether the

- plan submitted accurately showed the gross floor space of the building and as to what measurements should be taken to calculate the gross floor space.
22. During the course of the LDC application, the appellant submitted a revised plan (Drawing No 8550-1 Rev A) indicating measurements for the length and width of what is effectively a rectangular building. A sworn affidavit is provided from a chartered valuation surveyor outlining how these measurements were taken with a laser device. Based on these measurements, the appellant would suggest that the gross floor space of the building is some 498.76 sqm.
23. However, the revised plan and affidavit indicate that these measurements were taken from the internal face of the perimeter walls of the building. As Class PA refers to the '*gross floorspace*' of the building [my emphasis], in accordance with the Royal Institute of Chartered Surveyors '*Gross External Area*' calculation, this should include the external walls in the measurement.
24. As the measurements taken from the internal face of the walls show the resultant floor space to be very close to 500 sqm, on the evidence before me, the Class PA maximum gross floor space stipulation would more likely than not be exceeded. Thus, the proposed development is not PD under Class PA.
25. The Council also refers to confusion relating to whether 11 or 12 flats were proposed in the LDC application given the discrepancy referred to above between the prior approval application documentation and plan submitted. I agree that some ambiguity has been created by this, particularly given that the LDC application referred to 11 flats, whereas the appeal statement indicates that the reference to 11 flats in the prior approval application was in error and that 12 flats was the intention.
26. During the course of the appeal, the Council submitted evidence related to the issue of planning permissions for new dwellings in relevant catchment areas where wastewater generated by the development could potentially have significant effects on the Solent and Southampton Water Special Protection Area the Solent Maritime Special Area of Conservation.
27. Nevertheless, I have found in any event for the reasons outlined that the change of use proposed would not have been lawful if begun at the date of the LDC application.

Conclusion

28. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development 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.

V Bond

INSPECTOR