The Planning Inspectorate

Appeal Decision

Inquiry Held on 21 January 2020.

No site visit.

by Stephen Brown MA(Cantab) DipArch RIBA

an Inspector appointed by the Secretary of State

Decision date: 14 April 2020

Appeal Ref: APP/G5180/X/18/3200876
Bronze Works, Kangley Bridge Road, London 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 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by Nicholas and Dominic Hill against the decision of the Council of the London Borough of Bromley.
- The application ref. DC/17/02072/ELUD, dated 5 May 2017, was refused by notice dated 4 December 2017.
- 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 the use of the building as 8 no. flats (Class C3) pursuant to grant of prior approval under reference 13/13/03598/RESPA (Lawful Development Certificate – Existing).
- This decision supersedes that issued on 19 March 2019. That decision on the appeal was quashed by order of the High Court.

Decision

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

Application for costs

2. At the Inquiry an application for costs was made by the Council against the appellants. This application is the subject of a separate Decision.

Preliminary matters

3. Evidence at the Inquiry was taken under oath or solemn affirmation.

4. For the avoidance of doubt, I should explain that in an appeal under s.195 of the Act the planning merits of the existing development are not relevant, and they are not therefore an issue for me to consider in the context of an appeal which relates to an application for a lawful development certificate. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

5. The determination following the January 2019 Inquiry was quashed for the reason that the Inspector had regard to the judgement in the case of *Gravesham*[1] as to the definition of a dwellinghouse, that is - *'does the building in question (or part thereof) meet the definition of a dwellinghouse, i.e. does it have the distinctive characteristic of the ability to afford to those who used it the facilities required for day to day domestic existence?'.* He should however have given regard to the test in *Welwyn*[2]*/Impey*[3] as to when a material change of use can have occurred in the process of conversion to a residential use, as well as considering what that residential use was, and he did not directly do so. The answer he would have come to may well have been the same if he did, but in failing to consider the test in *Welwyn/Impey* and preferring to apply the Gravesham test he may have fallen into error on the correct lawful test to apply.

Background matters

6. The Town and Country Planning (General Permitted Development) (Amendment)(England) Order 2013 (the 2013 amendment order) introduced various amendments to The Town and Country Planning (General Permitted Development) Order 1995 (the 1995 Order). Regarding permitted changes of use, Class J of Part 3 to Schedule 2 introduced permitted development rights consisting of:

   Change of use of a building and any land within its curtilage to a use falling within Class C3 (dwellinghouses) of the Schedule to the Use Classes Order from a use falling within Class B1(a) of that Schedule.

7. Class J was subject to various limitations including, at paragraph J.1(c), that development was not permitted if the use of the building falling within Use Class C3 was begun after 30 May 2016. Furthermore, the permission was subject to a condition at J.2 requiring an application for determination as to whether prior approval of the local planning authority would be required – as set out in paragraph N of the 2013 Amendment Order.

8. In April 2015 The Town and Country Planning (General Permitted Development)(England) Order 2015 (the 2015 Order) came into force, repealing the 1995 Order as amended. It included Class O of Part 3 to Schedule 2, which granted planning permission for:

   'Development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwellinghouses) of that Schedule.'

   Again there was a condition requiring prior approval, and a limitation - under paragraph O.1(c) - stating that:

   Development is not permitted where the use of the building falling within Class C3 (dwellinghouse) of that Schedule was begun after 30 May 2016.

[1] *Gravesham Borough Council v SSE and Another* [1984] P&CR 142.
[2] *SSCLG & Anor v Welwyn Hatfield Borough Council* [2011] UKSC 15.
[3] *Impey v SoSE & Lake District Special Planning Board and Lake District Special Planning Board v SoSE & Impey* [1981] JPL 363.

9. However, the provisions of Class O were amended about a year later by the 2016 Amendment Order[4] which came into force on 6 April 2016. This amendment omitted limitation O.1(c), and replaced it with the condition at O.2(2) that:

   'Development under Class O is permitted subject to the condition that it must be completed within a period of 3 years starting with the prior approval date.'

Reasons

10. The main issue for me to determine is whether the Council's decision to refuse the grant of a LDC was well-founded. In that regard the principal questions are:

    - Whether the proposed development should be considered under the limitations and/or conditions of the 1995 Order as amended, or those of the 2015 Order as amended.
    - Whether the use of the building as 8 no. flats (Class C3) pursuant to grant of prior approval would have been lawful at the date of the LDC application – that is, 5 May 2017.

11. The parties now agree that the building was previously used for Class B1(a) purposes. In October 2013 the appellants applied for prior approval under Class J of the 1995 GPDO as amended, in accordance with paragraph N of the 2013 Amendment Order. Prior approval for conversion of the building from Class B1(a) to Class C3 was granted on 10 December 2013[5].

12. Although the parties agreed at the time of the previous Inquiry that Class O of the 2015 Order as amended in 2016 was the relevant provision, this is now a matter in dispute. Consequently, the first matter for me to consider is what limitations and/or conditions should apply to the development in the light of the repeal of the 1995 Order, its re-enactment by the 2015 Order and the subsequent 2016 Amendment.

13. In the High Court case of *Orange* - endorsed in the Court of Appeal[6] - it was determined that the extent of the permission to carry out the development became crystallised and defined on grant of prior approval on 10 December 2013. The permission became an accrued right. However, that case concerned a change in designation of the land following grant of prior approval, whereas in this instance it is the underlying law that has changed.

14. The appellants argue that under s.16(1)(c) of the Interpretation Act 1978 - to the effect that repeal of an Act does not affect any right accrued under that Act – the prior approval, together with its limitations and conditions should be preserved. However, s.17(2)(b) of the Interpretation Act provides that where an Act repeals and re-enacts with or without modification a previous enactment then, unless the contrary intention appears:

    'in so far as any subordinate legislation made or other thing done under the enactment so repealed or having effect as if so made or done, could have been done under the provision re-enacted it shall have effect as if made under that provision'.

[4] The Town and Country Planning (General Permitted Development)(England)(Amendment) Order 2016, which came into effect from 6 April 2016.
[5] Decision ref. DC/13/03598/RESPA.
[6] *R oao Orange Personal Communications Services and Others v the London Borough of Islington* [2005] EWHC 963 (Admin) & [2006] EWCA Civ 157.

15. In my opinion s.16 of the Interpretation Act applies in situations where an Act is repealed but not re-enacted, and is not the relevant Section in this case.

16. I concur with the Council's contention that Class O of the 2015 GPDO plainly was a re-enactment of Class J of the 1995 GPDO, and that Class O exactly reflected the provisions of Class J. Furthermore the limitation in O.1(c) reflected exactly that in J.1(c). The obligation to begin the change of use by 30 May 2016 in Class O.1(c) was then amended by the 2016 Amendment and replaced by the condition in O.2(2) of the 2015 GPDO to complete the change of use within 3 years.

17. I also concur with the advice given by the government's solicitor on 6 April 2016 that s.17(2)(b) of the Interpretation Act 1978 means that the prior approval under Class O as enacted in 2015 continues to have effect under Class O as re-enacted in 2016.

18. I consider this case must therefore be considered under the provisions of Class O of the 2015 GPDO as amended in 2016 – that is, subject to the condition that the development should be completed within three years of the date of prior approval.

19. The appellants object that they are disadvantaged by imposition of what they consider to be a retrospective condition. However, it must be borne in mind that unlike operational development, where there are probably reasonably well-defined start and completion dates, a change of use occurs effectively at a single moment. While that moment may be difficult to establish, it means that commencement and completion are essentially one and the same thing. As a result the change to the condition requiring completion within three years was advantageous for the appellants since it extended the critical date from 30 May 2016 to 10 December 2016.

20. Turning to the second principal question, in this case there is a trajectory of change from the starting point of office use, followed by a period of conversion works, and the eventual occupation of the residential units. At some point on this trajectory – possibly but not necessarily at the very end - it may be said that as a matter of fact and degree the change of use from office to dwellinghouse use has occurred.

21. In early 2014 works started with stripping out internal walls, ceilings, pipework, electrics, air conditioning and floor coverings. By March 2014 the only remaining internal elements in the building were the staircases.

22. However, in October 2014 the Council raised doubts about whether the building had properly been in B1(a) use or had been ancillary to a wider commercial use of the site. As a result the appellants submitted a LDC application in November 2015 to establish whether it had a lawful B1(a) use[7]. An appeal against non-determination of this application was allowed in July 2017[8].

23. In the meantime, being aware of the time limits that might apply, the appellants re-started the works in April 2016 in order to try to establish that the change of use had begun by 30 May 2016 as required by J.1(c). By 28 May 2016 Flat 1 had been completed and occupied, as agreed by the parties. In order to allow proper sequencing of building operations drainage trenches had

[7] LDC application ref. DC/15/05049/ELUD, dated 16 November 2015
[8] Appeal decision ref. APP/G5180/X/16/3154436, dated 27 July 2017.

also been dug, gas, water, electricity, telephone, aerial and satellite feeds had been brought through the building to serve the other 7 flats.

24. By 9 December 2016 Flats 2, 3, 5 and 6 were at a stage such that all services were complete including gas, electrical, water, telephone, satellite, and central heating. Floor finishes were complete, kitchen fixtures had been installed and the flats had been painted and decorated. However, bathroom fixtures had not been installed. Flat 4 had plastered walls with insulation, drainage and all services supplies had been installed, and second fix electrical work completed. There were no kitchen or bathroom fixtures. Flats 7 and 8 were at earlier stage, with drainage installed, walls plastered and insulated, and all service supplies in place, but again were no kitchen or bathroom fixtures. No entrance doors had been fitted, and common parts were unfinished.

25. In the ordinary course of things the grant of prior approval on 10 December 2013 would have allowed reasonably ample time for the appellants to carry out conversion works and effect the change of use by 30 May 2016. In the event, as a result of the uncertainty introduced by the Council's doubts over the B1(a) use of the Bronze Works, the failure to determine the LDC application, and determination of the subsequent appeal the conversion works were put in abeyance from October 2014 to April 2016.

26. In the case of *Impey* Donaldson LJ said that "a change of use to residential development can take place before premises are used in the ordinary and accepted sense of the word. The question arises as to how much earlier (than actual use) there can be a change of use, it may be that the test is whether they are usable, but it is a question of fact and degree". He proposed that the physical state of the premises is very important, but not decisive, that their actual use, or intended use, or attempted use are important but not decisive, and that these matters have to be looked at in the round.

27. The approach in *Impey* was endorsed in the much later Supreme Court case of *Welwyn*[9]*,* in which Lord Mance states that "too much stress has been placed on the need for 'actual use' with its connotations of familiar domestic activities carried on daily", and that in dealing with the question of "change of use of any building to use as a single dwellinghouse it is more appropriate to look at the matter in the round and to ask what use the building has or of what use it is".

28. The Council argue that the test of whether the units are dwellinghouses should be that set out in the case of *Gravesham*[10]*.* That is, whether they had the distinctive characteristic of being able to afford to those who used them the facilities required for day-to-day domestic existence. However, *Gravesham* was concerned with whether there was a distinction between a holiday chalet and a dwellinghouse, rather than determining whether there had been a change of use to a dwellinghouse. While I have borne *Gravesham* in mind, I have also had regard to the approaches suggested in *Impey* and *Welwyn*.

29. I accept that *Impey* refers to residential use rather than more specifically to dwellinghouse use. However, *Welwyn* is clearly concerned with a dwellinghouse and adopts principles set out in *Impey.* I do not accept the Council's contention that those principles are diminished in *Impey* by referring to residential use.

30. At the point when works were put in abeyance in March 2014 the building was a more or less empty shell. Although it was not in actual office use, it could reasonably readily have been refurbished and remained in such use. I do not consider the office use had been extinguished at that stage.

31. At the end of May 2016 Flat 1 had been completed and occupied, but the remainder of the building was still a shell. This cannot be regarded as completion of the development. I am not persuaded by the appellants' argument that this changed the use of the building as a whole, since the proposal was to create 8 flats, and subject to the condition that the development must be carried out in accordance with the details approved by the local planning authority. As a matter of fact and degree that had not occurred by May 2016, when 7 of the proposed flats were little more than the building shell.

32. By 9 December 2016 – in addition to Flat 1 being complete - the partitions, finishes, fixtures and service installations for the other 7 flats were all at an advanced stage, with room layouts and circulation areas defined, and the new staircase at the northern end of the building completed. I appreciate that bathroom fixtures had not been installed in nos. 2, 3, 4, 5, 6, 7 and 8, and that there were no kitchen fixtures in Flats 7 & 8. However, the works completed were very much integral to, and part and parcel of the alterations necessary for the change of use to 8 flats. Any use, or even potential use as offices had clearly ceased by then. In my opinion the layout, services, fixtures and finishes – even though incomplete - were at such an advanced stage that the conversion to 8 flats was readily apparent, and the possibility of reversion to office use essentially impractical.

33. Looking at the physical state of the building in December 2016, I accept that 7 of the flats did not offer all the facilities required for day-to-day domestic existence and were not properly habitable. Nevertheless, as noted above they had reached a stage where they were recognisably flats rather than offices. The extent and advanced state of the works, and the substantial financial investment made at considerable risk demonstrated the appellants' clear intention to bring the building into such use. Furthermore, they had made a serious and determined attempt to achieve this in the context of a significantly reduced timeframe, and uncertainty introduced by doubts over the original B1(a) use.

34. At this point in the trajectory it appears to me as a matter of fact and degree that use of the building had irreversibly changed from office use to use as 8 flats, each one a dwellinghouse. I consider therefore that on the balance of probabilities the change of use to 8 Use Class C3 flats had occurred by 9 December 2016, and that the development would have been lawful at the date of the LDC application – that is, 5 May 2017.

35. In coming to this conclusion I should stress that the weight I give to the appellants' clear intentions and serious attempts to carry out the conversion plays a significant part.

36. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the building as 8 no. flats (Class C3) pursuant to grant of prior approval under reference 13/13/03598/RESPA (Lawful Development Certificate – Existing) at Bronze Works, Kangley Bridge Road, London SE26 5AY was not well-founded and that the appeal should succeed. I will exercise the powers transferred to me under section 195(2) of the 1990 Act as amended.

Stephen Brown

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Jenny Wigley	of Counsel
She called:	
Dominic Hill	Appellant.

FOR THE LOCAL PLANNING AUTHORITY:

Ian Rees-Phillips	of Counsel.
He called:	
Karen Daye BSc(Hons) PGDipTP.	Principal Planning Officer, Bromley Borough Council.

DOCUMENTS

1 Attendance list.
2 Bundle of 4 legal authorities.
3 Statement of Common Ground, proof of evidence of Karen Day, and statutory declaration of Dominic Hill of December 2019.
4 Bundle of 21 authorities submitted to the High Court.
5 Extract from Martin H Goodall *'A Practical Guide to Permitted Changes of Use under the General Permitted Development Order'*.
6 Mr Rees-Phillips' closing submissions
7 Ms Wigley's closing submissions.

The Planning Inspectorate

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 5 May 2017 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto was lawful within the meaning of section 191(2) of the Town and Country Planning Act 1990 (as amended), for the following reason:

The change of use of the building to 8 no. flats (Class C3) pursuant to grant of prior approval under reference 13/13/03598/RESPA (Lawful Development Certificate – Existing) was completed by 10 December 2016, and the condition imposed by paragraph O.2(2) of The Town and Country Planning (General Permitted Development)(England)(Amendment) Order 2016, which came into effect from 6 April 2016, was discharged.

Signed:

Stephen Brown

INSPECTOR

Date: 14 April 2020
Reference: APP/G5180/X/18/3200876

First Schedule

Change of use of the building to 8 no. flats (Class C3) pursuant to grant of prior approval under reference 13/13/03598/RESPA (Lawful Development Certificate – Existing).

Second Schedule

Land at Bronze Works, Kangley Bridge Road, London 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 /operations described in the First Schedule taking place on the land specified in the Second Schedule was /were lawful, on the certified date and, thus, was /were 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 /operations described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use /operation 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.