



Appeal Decision

Hearing Held on 19 November 2019

Site visit made on 19 November 2019

by E Brownless BA (Hons) Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 5 May 2020

Appeal Ref: APP/P5870/W/19/3230924

Sutton Park House, 15 Carshalton Road, Sutton, Surrey SM1 4LD

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant approval under Schedule 2, Part 3, Class O of the Town and Country Planning (General Permitted Development)(England) Order 2015.
 - The appeal is made by Lawlor (Holdings) Limited against the decision of the Council of the London Borough of Sutton.
 - The application Ref: DM2019/00476, dated 12 March 2019, was refused by notice dated 14 May 2019.
 - The development proposed is Prior Approval for change of use from an office to residential use providing 94 units, provision of a private access road and 56 car parking spaces including 10 disabled spaces.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. I have used the description of the development provided by the Council on the decision notice as this more accurately reflects the proposal.
3. I have amended the address of the appeal site. This accords with the address provided by the appellant upon the appeal form and accurately reflects the premises I visited during my site visit. I agreed to this amendment at the hearing.
4. A draft planning obligation was made available at the hearing. Consequently, the Council confirmed it would not defend reason for refusal number 2 relating to the transport and highways impacts of the development. A completed version of the unilateral undertaking was provided after the hearing.

Main Issues

5. The main issue is whether the proposal would be permitted development under Class O, subject to the prior approval of certain matters.

Reasons

Whether the proposal would be permitted development

6. The application was made under Schedule 2, Part 3, Class O of the Town and Country Planning (General Permitted Development)(England) Order 2015, as amended (GPDO), in which prior approval for the change of use of an office to ninety four dwellings was sought.

7. Class O permits 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 to a use falling within Class C3 Dwellinghouses subject to the restrictions on development contained within Paragraph O.1.
8. A Prior Approval (the 2014 Prior Approval) for the change of use of the property from office to residential use was granted by the Council on the 24th December 2014 in accordance with Class J, Part 3 of the Town and Country Planning (General Permitted Development) Order 1995 (GPDO 1995).
9. Subsequently, the Council confirmed a non-immediate Article 4 Direction to remove permitted development rights for a change of use from B1(a) Office to Class C3 Dwellinghouses on the 15 January 2014.
10. The Article 4 Direction (the Direction) came into effect on the 29 January 2015, shortly after the 2014 Prior Approval had been granted, subject to a modification to the Direction by the Secretary of State.
11. The modification by the Secretary of State to the Direction inserted an exception (the Exception) to the withdrawal of the permitted development rights to exclude any office premises which have secure prior approval before 29th January 2015.
12. As at the 29 January 2015, upon the Direction coming into effect, the premises benefitted from planning permission for the change of use from office to residential use subject to compliance with the limitations and exceptions of that part. It is common ground that the 2014 Prior Approval expired on the 24 December 2017 without the development being commenced.
13. It is the appellant's case that, notwithstanding the lapse of the 2014 Prior Approval, through the operation of Article 3 of the GPDO, the base planning permission created by the GPDO hasn't expired and thus the modification to the Direction by the Secretary of State has led to the premises falling within the Exception. Consequently, the Direction would not apply to the premises.
14. In support of this view, the appellant has drawn my attention to the Park View case¹. Whilst I accept there are a number of similarities between the Park View case and this appeal, unlike in the Park View case, the 2014 Prior Approval had lapsed. The Park View case concerned an extant Prior Approval. At paragraph 63 of the Judgment, the Judge found that (for the purposes of that claim) it was not necessary to decide whether the exclusionary effect of the Direction extends to lapsed prior approvals.
15. Furthermore, the Judge commented that without needing to decide the point, the wording of the exclusion in that case, is ambiguous in respect of requiring 'has been granted' to be read as 'was once granted'. In addition, the context and purpose of the Direction may not support the same answer in relation to lapsed permitted development rights as the Judge had arrived at in relation to extant prior approvals. I accept that these comments must be viewed with caution as the Judge was not specifically tasked with determining the point concerning lapsed prior approvals. However, there is no other case-law before me that specifically deals with the matter of a lapsed prior approval.

¹ R (Berkshire Assets) v London Borough of Hounslow [2018] EHC 2896 (admin)

16. I note that the appellant seeks to separately challenge the Council in respect of their decision on this matter. However, as no judgment has been reached, I must therefore decide this appeal on the basis of the evidence before me.
17. In terms of the modification, the appellant argues that there is no justification for "reading in" a proviso that the Exception will not apply to lapsed prior approvals when there is no reference to that within the Direction itself. However, to my mind, the natural and ordinary wording of the modification is plain in that the Direction will not apply to any building or land to which prior approval under paragraph J.2 of Part 3 of Schedule 2 to the GPDO 1995 has been granted. In order for me to conclude that the Direction applied to prior approvals that had once been granted would require me to imply those words into the reading of the Exception. In the absence of specific wording dealing with prior approvals that were once granted, this would require an implied approach which would be contrary to the view set out in the Warren Farm Case².
18. Additionally, at the time the modification was added by the Secretary of State, the permitted development rights for a change of use from office to residential were temporary. Consequently, when the Direction came into force, a condition under Class J, Part 3 of the GPDO 1995 required the dwellinghouse use to have been commenced by the 30 May 2016. This condition was subsequently removed in April 2016, in effect making the permitted development rights permanent. However, at the time of the Secretary of State's modification and the Direction coming into force, a prior approval development would have then been required to have commenced just over a year later. In my view, the issue of a lapsed prior approval would simply not have been contemplated by the decision maker, nor was it dealt with within the Direction.
19. The purpose of issuing the Direction was to protect the employment land of the borough. The supporting text within the Secretary of State's modification letter recognised the uncertainty faced by developers whenever a local planning authority issued a non-immediate Direction. In particular, the letter goes on to state 'this is particularly the case when prior approval has been granted by a local planning authority but a developer has not completed development before a non-immediate Article 4 direction comes into force'. To my mind, the plain intention of the wording of the modification was to ensure that the Direction did not have a retrospective effect, such that developers who had an extant prior approval including those who had already commenced development, could do so without the development being deemed to be unlawful by reason of the implementation of the Direction.
20. On the basis of the evidence before me, I conclude that prior approval for a change of use from office to residential was granted subject to it being implemented. By reason of non-implementation, the prior approval expired. The purpose of the modification was not to allow the Direction to be disapplied in circumstances where no extant permitted development rights existed. In my view, it is entirely reasonable that the Direction should apply to the appeal site now that the 2014 Prior Approval has lapsed.
21. Accordingly, I conclude that the proposed change of use would not be development permitted under Schedule 2, Part 3, Class O of the GPDO.

² Warren Farm (Wokingham) Ltd v Wokingham Borough Council [2019] EWHC 2007

Other Matters

22. The appellant has drawn my attention to Local Plan Allocation STC21 for Sutton Park House. I accept that the Council may have based its delivery assumptions on the basis that the site can come forward for residential development. However, the Local Plan was adopted in February 2018 and therefore it affords very little in terms of the interpretation of the Direction which was brought into force before its existence. I have therefore determined this appeal on its individual merits.
23. Given my findings that the change of use would not be development permitted under Schedule 2, Part 3, Class O of the GPDO, there is no need for me to go on and consider the prior approval matters of transport and highway impacts as this would not alter the outcome of this appeal. Similarly, whilst I have considered the obligations and benefits within the section 106 agreement, their provision does not alter my findings above.

Conclusion

24. For the reasons given above and based on the evidence before me, I conclude that the proposal is not permitted development under Schedule 2, Part 3, Class O of the GPDO, as amended. It is development for which express planning permission is required and that could only be granted on application made to the local planning authority in the first instance.
25. Therefore, the appeal must be dismissed.

E Brownless

INSPECTOR

APPEARANCES

FOR THE APPELLANT:

Sarah Reid of Counsel	Kings Chambers
Nicola Insley	Senior Associate, CMS Cameron McKenna Nabarro Olswang LLP
Graeme Thorpe	Group Planning Manager, Leith Planning Limited

FOR THE LOCAL PLANNING AUTHORITY:

Tim Comyn of Counsel	FTB Chambers
David Fellows	Sutton London Legal Partnership
Iain Williams	Senior Planner, London Borough of Sutton

DOCUMENTS SUBMITTED AT THE HEARING

- 1 Notification of appeal dated 6 September 2019
- 2 Notification of hearing dated 4 November 2019
- 3 Statement of Common Ground dated 31 October 2019
- 4 Patrick Keenan v Woking Borough Council [2017] EWCA Civ 438