



Appeal Decision

Site visit made on 27 May 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

an Inspector appointed by the Secretary of State

Decision date: 22 July 2020

Appeal Ref: APP/Y0435/X/20/3246459

Eagle Farm, Cranfield Road, Wavendon MK17 8AX

- 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 McCann Homes against the decision of Milton Keynes Council.
 - The application Ref 19/02702/CLUP, dated 14 October 2019, was refused by a notice dated 9 December 2019.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act).
 - The development for which a certificate of lawful use or development is sought the change of use of the building and its curtilage to residential use comprising 6 dwellings.
-

Decision

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

Preliminary Matters

2. The address in the banner heading above is taken from the application form. In addition, the description of the development is taken from the covering letter that was submitted with the LDC application. It is clear from the evidence before me that the LDC relates to the proposed residential use of Unit 2 on the above site. I have dealt with the appeal on this basis.
3. There are 3 additional appeals¹ on other units at Eagle Farm and I have dealt with each in a separate decision letter.

Background and Main Issue

4. Article 3(1) and Schedule 2, Part 3, Class P of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (GPDO) grant planning permission for the change of use of a building and any land within its curtilage from a use falling within Class B8 (storage or distribution centre) 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.
5. Article 2(1) of the GPDO states, amongst other things, that *'In this Order- "building"- (a) includes any structure or erection and, except in ... [Classes P and PA of Part 3] ...of Schedule 2, includes any part of a building...'*². Therefore, Class P cannot apply to part of a building.

¹ Ref Nos: APP/Y0435/X/20/3246458, APP/Y0435/X/20/3246460 & APP/Y0435/X/20/3246461

² Words inserted by Town and Country Planning (General Permitted Development) (England) (Amendment) Order 2018/343 art.3(a) (April 6, 2018)

6. In April 2019 the appellant applied to the Council seeking confirmation as to whether its prior approval would be required for a change of use of the appeal building from a Class B8 use to 6 dwellings (Class C3). The application was given reference 19/01040/PANOTH. There are a number of limitations and conditions within paragraphs P.1. and P.2. of Class P of the GPDO. Paragraph P.1.(a) states, amongst other things, that development is not permitted if the building was not used solely for a storage or distribution centre use on 19th March 2014 or in the case of a building which was in use before that date but was not in use on that date, when it was last in use.
7. The appellant argues that the use of the building falls within Class B8 of the UCO, whereas the Council maintains that it falls within a mixed use with features of both storage or distribution (Class B8) and retail (Class A1) uses. There is no suggestion from either party that any of the other limitations in P.1. or conditions in P.2. would not be complied with and I have no reason to disagree with that approach.
8. There is no dispute that the land within the '*curtilage*' of the building as shown on the submitted location plan would comply with the definition of '*curtilage*' as stated at paragraph P.3.(b) - '*an area of land immediately beside or around the building in storage or distribution centre use no larger than the land area occupied by the building*'.
9. There is also no dispute that the Council did not determine that application and as such the prior approval is deemed to have been granted. However, a Court of Appeal decision³ makes it clear that if an application for prior approval is submitted for works that do not fall within the scope of permitted development, and the Council fails to issue a decision within the specified period, the works do not become permitted development.
10. Therefore, the appellant sought to demonstrate through an LDC application, which is the subject of this appeal, that the change of use to residential use comprising 6 dwellings was lawful.
11. The Court of Appeal decision also states that crucially, the grant of planning permission itself comes about not through the procedure to be followed under article 3(2) of the GPDO and the specific provisions for 'Conditions' in a class, but through the operation of article 3(1) of the GPDO and the provisions for permitted development in that class. As such, to be permitted development in the first place, the development in question has to come fully within the relevant description of the permitted development provided for within each class.
12. Against all of the background information above, the main issue is whether the Council's decision to refuse to issue an LDC was well-founded. This will turn on whether the proposed development would entail a change of use of a building and any land within its curtilage from a use falling within Class B8 of the UCO to a use falling within Class C3 of the UCO.

Reasons

13. The onus is on the appellant to make their case on the balance of probability. If there is no evidence to contradict or make the appellant's version of events

³ Keenan v Woking BC and SSCLG [2017] EWCA Civ 438.

- less than probable, and their evidence alone is sufficiently precise and unambiguous, an LDC should be granted.
14. The appeal building constitutes a relatively modern building that forms part of a larger complex that was originally part of a farm. Several buildings have been used for various commercial/industrial uses and are sited within a communal parking/access area. There is no dispute that the proposed use of the appeal site would fall within Class C3 of the UCO.
 15. The evidence before me indicates that in 1990 planning permission⁴ was granted for a '*Change Of Use of Redundant Agricultural Buildings to Light Industrial (Class B1), General Industrial (Class B2) and Storage and Distribution (Class B8) and Repositioning Of Access*' at Eagle Farm. I have not been provided with a copy of the decision notice associated with that planning permission. Nevertheless, there is no dispute that Class B8 of the UCO was one of the uses specified for Unit 2 through that planning permission.
 16. At the time of my site visit the unit was vacant but both parties have submitted internal photographs of the unit from when it was occupied. However, at the time of the LDC application Unit 2 was occupied by The Greenhouse Effect Hydroponics Ltd (TGE). This company appears to have stored and distributed hydroponics equipment and supplies from Unit 2 for at least 17 years. Nevertheless, the Council considers that based on the observations of its Officer at a site visit that there was a retail shop area including: shop counter with computer and credit/debit card machine, rows of shelving units featuring priced hydroponics goods and a number of demonstrator products including a warm room with banana plants. It considers that this retail element had also been in place for at least 17 years and that based on the size of the area with shelved units, the presence of a card reader and the general public being able to walk into the retail element indicates that this part of the use cannot be ancillary to the Class B8 use and therefore the unit was in a mixed use.
 17. The concept of the planning unit is a means of determining the most appropriate physical area against which to assess the materiality of a change of use. The broad tests for determining the appropriate planning unit are set out in the Burdle judgement⁵. Whilst, Schedule 2, Part 3, Class P of GPDO refers to the change of use of a '*building and any land within its curtilage*' I consider that the guidelines established by the Burdle judgement are useful in determining whether the use of the appeal building would, at the date of the LDC application, have been within Class B8 of the UCO or a mixed use.
 18. As a general rule and starting point the planning unit is the area in the same occupation or ownership because that is normally the unit in which a set of functionally and physically interdependent activities are carried out. The assessment is a matter of fact and degree.
 19. A planning unit in a composite or mixed use is described as an entire unit of occupation where the occupier carries on a variety of activities and it is not possible to say that one is incidental or ancillary to the other. A composite use is where the component activities fluctuate in their intensity from time to time but the different activities are not confined within physically and distinct units of land. It also may occur that within the single unit of occupation two or more

⁴ Ref: MK/1140/90

⁵ Burdle & Williams v SSE & New Forest RDC [1972] 1 WLR 1207

physically separate and distinct areas are occupied for substantially different and unrelated purposes. In such a case each area used for a different main purpose, together with its incidental activities, ought to be considered as a separate planning unit.

20. In this case, the whole of the appeal building was occupied by TGE in association with Unit 3. Both units were used to store and distribute hydroponic supplies and equipment. The distribution of those supplies and equipment appears to have been facilitated by a website. Orders for goods could be placed online and by the telephone. I have not been provided with any specific evidence on the proportion of goods that were delivered directly to customers rather than them being collected or purchased from the appeal site. Nevertheless, given the relatively specialist nature of those hydroponic supplies and equipment it is reasonable to consider that a large proportion of them would have been delivered to customers.
21. From the photographs before me it would appear that there was a counter to serve customers within part of Unit 2 and numerous items appear to be stacked on shelves with names and prices of the items on the shelf. I acknowledge that the items being stacked and priced on the shelves has the appearance of a retail unit. Nevertheless, the appellant has also provided photographs that indicate that in other parts of the building that stock was named and priced on shelving. I have no reason to doubt the appellant's evidence that the stock was arranged in this way as employees packing deliveries needed a reference point for identity and price. It would be reasonable to consider that, even though, the stock on the shelves could have been treated as being displayed in connection with its retail sale it could also have been stored on those shelves prior to being distributed to customers via online or telephone sales.
22. Neither party has submitted a floor plan to indicate how the building was laid out when in use by TGE and it is not entirely clear from the photographic evidence as to the proportion of the building that customers would have had access to. Even though, there was a customer counter which also had a card machine, in my experience, a card machine can also be used to pay for telephone orders even if they are to be delivered.
23. The same equipment and supplies were stored and distributed as were sold or collected on the site. Therefore, the retail sales and display of goods on the shelving was functionally related to the storage and distribution use. It is reasonable to consider that specific figures to distinguish between the sales that occurred online, on the telephone or at the site would not be possible as they would all appear as retail sales in the company's accounts. There is no indication that retail sales were advertised on the external parts of the building and the building had the appearance of an industrial unit.
24. Furthermore, there is no evidence before me to indicate that the use of the appeal building was materially different in character to a Class B8, of the UCO, use, for example with regard to traffic generation, parking and related effects on local amenity.
25. As such, on the balance of probability, it seems to me that the elements of the retail sale and display of goods for sale where the sale, display or service was to visiting members of the public from the appeal building would have been subsidiary and ancillary to the primary use when considered as a whole. The

overall character of the use of the appeal building/planning unit was, at the date of the LDC application, as a storage or distribution centre, within Class B8 of the UCO. Accordingly, therefore, I find that the proposed development would be lawful as it would fall within the provisions of Article 3(1) and Schedule 2, Part 3, Class P of the GPDO and so would be permitted development on this basis.

Conclusion

26. For the reasons given above I conclude, on the evidence now available, that the Council's refusal in part to grant an LDC 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.

D. Boffin

INSPECTOR

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(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 14 October 2019 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged in red on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

It would fall within the provisions of Article 3(1) and Schedule 2, Part 3, Class P of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) and so would be permitted development on this basis.

Signed

D. Boffin
Inspector

Date 22 July 2020

Reference: APP/Y0435/X/20/3246459

First Schedule

The change of use of the building and its curtilage to residential use comprising 6 dwellings.

Second Schedule

Land at Eagle Farm, Cranfield Road, Wavendon MK17 8AX.

NOTES

This certificate is issued solely for the purpose of Section 192 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 would have been 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.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.



Plan

This is the plan referred to in the Lawful Development Certificate dated: 22 July 2020

by D Boffin BSc (Hons) DipTP MRTPI Dip Bldg Cons (RICS) IHBC

Land at: Eagle Farm, Cranfield Road, Wavendon MK17 8AX

Reference: APP/Y0435/X/20/3246459

Scale: Not to Scale

SJ2 - Site Location Plan - Unit 2 Eagle Farm

