



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/20/3246461

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 19/02688/CLUP, dated 14 October 2019, was refused by 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 use for which a certificate of lawful use or development is sought is the change of use of the building and its curtilage to residential use comprising 2 dwellings.
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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 9 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 PA 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 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.
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 PA cannot apply to part of a building.

¹ Ref Nos: APP/Y0435/X/20/3246458, APP/Y0435/X/20/3246460 & APP/Y0435/X/20/3246459

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 light industrial use (B1(c)) to 2 dwellings (C3). The application was given reference 19/01042/PANB1C. There are several limitations and conditions within paragraphs PA.1. and PA.2. of Class PA of the GPDO. Paragraph PA.1.(b) states that development is not permitted if the building was not used solely for a light industrial 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 B1(c), whereas the Council maintains that it falls within Class B2 (general industrial) of the UCO. 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.
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 PA.3.(b) - *'an area of land immediately beside or around the building in light industrial 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. Therefore, the appellant sought to demonstrate through a LDC application, which is the subject of this appeal, that the change of use to residential use comprising 2 dwellings was lawful at the date of the application.
10. 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 must come fully within the relevant description of the permitted development provided for within each class.
11. Against all of the above background information, 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 B1(c) of the UCO to a use falling within Class C3 of the UCO.

Reasons

12. 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 less than probable, and their evidence alone is sufficiently precise and unambiguous, an LDC should be granted.
13. 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

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

- been used for various commercial/industrial uses and are sited within a communal parking/access area. The appeal building is close to other buildings that appear to be in residential use. However, there is no dispute that currently the appeal building is not within a residential area and that the proposed use of it would fall within Class C3 of the UCO. The M1 Motorway and the A421 are near to part of the overall Eagle Farm site and I noted that there are currently construction works being undertaken on sites close to it.
14. 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 B1(c) of the UCO was one of the uses specified for Unit 9.
 15. The UCO describes a Class B1(c) use as including a use '*for any industrial process, being a use which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit*'. The compatibility with residential area amenity is the governing criterion for this class and such uses should be capable of being carried out in *any residential area* [my emphasis]. A Class B2 use is defined in the UCO as a use for the carrying on of an industrial process other than one falling within Class B1.
 16. The meaning of the term '*industrial process*' is given in Article 2 of the UCO and subparagraphs (a) and (b) are directly relevant. An industrial process is a process for, or incidental to, (a) the making of any article or part of any article (including a ship or vessel, or a film, video or sound recording), or (b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article.
 17. It would appear from the information before me that at the time the LDC application was submitted the appeal building was occupied by MK Upholstery and Jim Tofts French Polishing in separate sections of it. At the time of my site visit the appeal building was vacant and the Council's Officer Report states that the part of the building that had been occupied by the upholstery firm was vacant at the time of the officer's visit.
 18. However, internal photographs of the appeal building, taken by the Council in 2019, form part of the evidence before me. These show the paint booth and areas inside of the building and I acknowledge that the photographs only provide visual evidence for the operation of the French polisher. Nevertheless, the Council's Officer Report states that '*during the site visit it was noted that the site contained a range of tools for polishing/painting furniture, including a paint booth with extractor fan and motor.*'
 19. Based on the evidence before me it is reasonable to consider that both the upholstery and French polisher firms were undertaking work that including making, altering, repairing, ornamenting, finishing and cleaning items. As such, the type of activities that were taking place can reasonably be described as an '*industrial process*'.

⁴ Ref: MK/1140/90

20. The Council considers that even though the upholstery use can be treated as falling within Class B1(c) of the UCO that the use by the French polisher would fall within Class B2 of the UCO due to equipment within that part of the building creating noxious fumes and therefore it would not be suitable in a residential area. Its Officer Report states that *'During the visit the smell of paint and polish was highly evident within the unit and it was confirmed that the paint booth and extractor fan was still in use to remove paint/polish fumes from within the building.'* In addition, within its Statement of Case the Council have also cited the potential for noise disturbance from the operation of a paint booth and its extraction system.
21. There is no dispute that the use of part of the building by the French polisher would have created fumes inside the building due to the use of paint and other chemicals. In my experience, the use of a paint booth is normally required to ensure that employees working with paint and other chemicals can do so in a safe environment. A paint booth also needs to be ventilated and as stated in the Officers Report they are normally associated with an extract system.
22. Nevertheless, it is reasonable to consider that an extract system would include filtration to ensure that any fumes/smells are removed or significantly reduced from the air before it is expelled from that extract system. Furthermore, the Officer's Report makes no reference to any smells, fumes or noise from the extract system being evident externally at the officer's site visit. Even though, there is a high level of background noise from traffic on the highway network the Officer's Report, in relation to Unit 2, did note that noise from the industrial process being operated in that unit was evident externally.
23. In addition, the appellant has stated that the Bungalow at Wavendon Lodge is situated within metres of the extract system and other dwellings are also close to it. They also state that there is no evidence that the Council's Environmental Health department have ever received any complaints in relation to the operation of the extract system. Furthermore, the Council have not provided any evidence of any complaints ever being received from any of the dwellings in relation to the operation of Unit 9.
24. I acknowledge that the car repair/renovation use within Unit 4 on the overall site also has a paint booth within it and that there is no dispute that the use of Unit 4 falls within Class B2 of the UCO or is a sui generis use. However, in my judgement whether a use has a paint booth is not the only factor that would determine what a use is classified as, for planning purposes. The overall character of the use has to be taken into account and in relation to Class B1(c) whether the use associated with an industrial process can be carried out without causing detriment to the amenity of any residential area by reason of, amongst other things, noise, smell and fumes.
25. In this case, even though the appeal site is not in a residential area there are dwellings near to the extract system of Unit 9. The appellant has stated that there is no evidence to indicate that the operation of the extract system has harmed the amenity of the occupiers of those dwellings. Furthermore, there is no evidence before me to contradict this.

26. Based on the evidence before me and given the proximity of those dwellings I consider that, on the balance of probability, that the French polishing use would have been able to be carried out in any residential area without detriment to the amenity of that area by reason of noise, smell or fumes. Taking into account all of the above, in relation to the nature and type of processes that were being undertaken within the building it is more likely than not that the character of the primary use of the building and any land within its curtilage, at the time of the LDC application, would have been from a use falling within Class B1(c) of the UCO.
27. 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 PA of the GPDO and so would be permitted development on this basis.

Conclusion

28. 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 PA 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/20/3246461

First Schedule

The change of use of the building and its curtilage to residential use comprising 2 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

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Scale: Not to Scale

SJ3 - Site Location Plan - Unit 9 Eagle Farm

