



Appeal Decision

Hearing Held on 24 November 2020

Site visit made on 30 November 2020

by Andrew Walker MSc BSc(Hons) BA(Hons) BA PgDip MCIEH CEnvH

an Inspector appointed by the Secretary of State

Decision date: 05 January 2021

Appeal Ref: APP/B5480/X/19/3237969

5 Writtle Walk, Rainham RM13 7XB

- 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 Mr Asad Chaudhry (Interface Properties) against the decision of the Council of the London Borough of Havering.
 - The application Ref E0013.19, dated 9 April 2019, was refused by notice dated 11 June 2019.
 - The application was made under section 191(1)(a) of the Town and Country Planning Act 1990 as amended (the Act).
 - The use for which a certificate of lawful use or development is sought is use as A3 & A5 restaurant.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The appellant confirmed at the hearing that the terms of the application were as dealt with by the Council: a mixed use of Use Classes A3 and A5 for the purposes of the Town and Country Planning (Use Classes) Order 1987 as amended (the UCO). The UCO defines A3 as "*Use for the sale of food or drink for consumption on the premises*" and A5 as "*Use for the sale of hot food for consumption off the premises*". I should underline however that where the primary use of land is a mixture of different uses, such mixed use does not fall into any of the classes set out in the UCO. The stated use subject to the application is therefore *sui generis*. However, for the purposes of this appeal I shall refer to what is applied for as "the stated A3/A5 mixed use".
3. The above clarification was sought since there are instances in the appeal papers where it appeared that the appellant was in fact arguing that the lawful use was A3 with ancillary A5 use (where any takeaway food sold on an ancillary basis is usually taken home for consumption).
4. The UCO has been recently amended by legislation that makes changes to Use Classes¹. However, the appeal before me relates to the lawful use of the appeal property at the time of the application on 9 April 2019 and references to Use Classes under the UCO will accordingly be as they existed on that date.

¹ The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020

5. The Council confirmed at the hearing that it had made an administrative mistake in its decision letter in referring to section 192 of the Act, rather than section 191. However, the application was clearly made under section 191 and the Council's error does not affect my determination of the appeal against the Council's refusal of it.
6. For the avoidance of doubt, I should explain that planning merits are not for me to consider in the context of an appeal against refusal to issue a LDC. My decision rests on the facts of the case, and on relevant planning law and judicial authority.

Main Issue

7. The main issue in this appeal is whether or not the Council's decision to refuse the application for the LDC was well-founded.

Reasons

8. For this appeal to succeed, the burden of proof is on the appellant to satisfy me on the balance of probabilities that the stated A3/A5 mixed use was lawful at the time of the application on 9 April 2019.
9. The planning history of the property indicates that planning permission was granted in 2008² for change of use from A1 (Shop) to A3 (café). There is a dispute between the appellant and the Council as to whether that planning permission was implemented, as the Council says that conditions precedent were not discharged. Notwithstanding which party is correct, that dispute is not material to the determination before me as, regardless of the outcome, the stated A3/A5 mixed use for which the LDC sought is neither A1 or A3 use and therefore the success of the appeal is not based on the existence of planning permission but rather immunity over time.
10. Section 191(2) of the Act says that uses are lawful at any time if no enforcement action may be taken in respect of them, including due to the time for enforcement action having expired. Section 171B(3) of the Act provides that, where there has been a material change of use of land as in the stated A3/A5 mixed use, no enforcement action may be taken after the end of the period of 10 years beginning with the date of the breach.
11. The appellant's case is that the appeal property has been in use for the stated A3/A5 mixed use continuously since 2008, notwithstanding short and materially insignificant periods of vacancy between operators and for a longer period of vacancy leading up to the current date.
12. However, it is very clear from the evidence that there has not been such continuous stated A3/A5 mixed use for at least 10 years.
13. Firstly, I place substantial weight on the fact that the appellant (while represented by a professional agent) did not appeal under ground (b) of Section 174(2) of the Act against the enforcement notice issued on 15 April 2011³ which alleged an unauthorised change of use to A5 (Takeaway).
14. Consequently, the appellant did not raise as a ground of appeal that the matter as stated in the notice had not occurred and I note significantly the words of

² P0267.08, 7 April 2008

³ ENF/388/10/SX

the Inspector who determined the appeal (on other grounds) that "*in this case the appellant does not dispute that there has been a material change of use to Class A5 (take-away)*"⁴.

15. Accordingly, it is clear by the appellant's own actions in response to the enforcement notice issued - and the associated appeal - that the property had been operating with an A5 primary use rather than the stated mixed A3/A5 use. Further it cannot be argued otherwise now, particularly as section 285 of the Act provides that the validity of an enforcement notice, except by way of an appeal against it, cannot be questioned in any proceedings whatsoever on any of the grounds on which such an appeal may be brought.
16. Secondly, I place considerable weight on the fact that the appellant was successfully convicted for subsequently failing to comply with the enforcement notice's requirement to cease the unauthorised use as an A5 take-away from 21 October 2011 to 21 March 2012. The conviction was upheld on appeal at Crown Court. Both courts were satisfied beyond reasonable doubt that the use of the property between these relevant dates was A5 (after several days consideration of the evidence), which is a higher standard of proof than the balance of probabilities standard in this appeal. The Crown Court transcript is clear that the use was not as a *sui generis* mixed use A3/A5 premises. It goes on to say "*Putting all the evidence together, including the history we have recited, we are quite sure that 5 Writtle Walk was being used as a takeaway during the relevant period and that any consumption of food on the premises was incidental or ancillary to that use. The offence is, therefore, prima facie made out*" (page 37).
17. For the above reasons, I find that there were (at least) significant periods in 2011 and 2012 when there was not the stated A3/A5 mixed use and therefore based on all the evidence I am not persuaded on the balance of probabilities that this was the lawful use of the property on the date of the application due to a period of 10 years continuous such use having accrued.
18. The appellant has provided copies of 2 previous appeal decisions⁵ but has not made a substantive argument as to why they are materially relevant to his appeal. I have considered them, but they do not alter my conclusion.

Conclusion

19. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of use as A3 & A5 restaurant 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.

Andrew Walker

INSPECTOR

⁴ APP/B5480/C/11/2153437, Decision date 21 September 2011, paragraph 5

⁵ APP/K5600/C/08/2080348, APP/U5360/C/07/2055965

APPEARANCES

FOR THE APPELLANT:

Asad Chaudhry (appellant)
Shahlab Baig (agent)

FOR THE LOCAL PLANNING AUTHORITY:

Cole Hodder
Onkar Bhogal

INTERESTED PERSONS:

Ian Weatherley (Chairman of
the local Ward Panel)