The Planning Inspectorate

Appeal Decision

by Felicity Thompson BA(Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 11 August 2021

Appeal Ref: APP/Z5630/X/21/3268004
50 Clarence Street, Kingston Upon Thames KT1 1NR

- 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 T.E. Canterbury Ltd against the decision of the Council of the Royal Borough of Kingston upon Thames.
- The application Ref 20/01355/CPU, dated 5 June 2020, was refused by notice dated 4 August 2020.
- The application was made under section 192(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 described as *change of use from class A2 financial and professional services to a mixed use of class A2 and two flats (class C3) is permitted development.*

Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application sought is a certificate of lawfulness for a proposed use. The purpose of an application made under section 192 of the Act is to find out whether the proposed use, as described in the application form and shown on the drawings, would be lawful if instituted or begun at the time of the application, it is not the equivalent, in law, of a planning permission. The burden of proof rests with the appellant and the appropriate test of the evidence is the balance of probabilities.

3. The planning merits of the proposed use are not relevant to this appeal. My decision rests on the facts of the case and the interpretation of any relevant planning law. As such, the appellants misgivings about how the Council dealt with the application have no bearing on my decision.

4. On 1 September 2020 the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987 (UCO). As a result, from 1 September 2020, a new broad 'commercial, business, service' use (Class E) was created, which incorporates the previous A1 and A2 use classes.

5. The Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO) has also been amended[1] as a consequence of these changes, specifically and relevant to this appeal Article 3 Schedule 2 Part 3.

[1] The Town and Country Planning (General Permitted Development etc.) (England) (Amendment) (No. 2) Order 2021

6. However, the relevant date for determining whether the proposed use is lawful, is the date of the application. Consequently, as the application was made prior to both amendments, it must be determined by reference to the Use Class/Order in force at that time.

7. In reviewing the file, it appeared that the appeal could be determined without a site visit – without causing prejudice to any party. This is because the parties have submitted sufficient evidence to understand the nature of the site and the proposed use given the points in dispute.

Reasons

Background

8. Article 3 Schedule 2 Part 3 Class G of the GPDO grants permission for various changes of use subject to specified conditions and limitations, including the change of use from a use for any purpose within Class A2 (financial and professional services) of the Schedule to the Use Classes Order to a mixed use for any purpose within Class A2 (financial and professional services) of that Schedule and as up to two flats.

9. The description in the banner heading above is taken from the appellants original application form. However, I note that the appellants evidence seeks to demonstrate that the lawful use of the site is for Class A1 (shops) purposes on the basis that whether the lawful use is A2 or A1 it would benefit from the same rights under Part 3 Class G of the GPDO. However, under s.192 there is no implied power to modify the description of the proposed development.

10. While the LDC before me is not seeking to establish the lawfulness of the existing use, whether that is Class A2 or A1, this is at the heart of the Council's concern as set out in its decision notice and permitted development rights only pertain to lawful uses. Moreover, I have been provided with evidence seeking to demonstrate lawfulness of the existing use.

11. Section 191(2) of the Act states that uses are lawful at any time if no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason) including that the change to that use was made with the benefit of express or deemed planning permission and continuance of the use is in accordance with the terms of the planning permission.

The appellants evidence

12. The appellants evidence consists of summaries of and references to the planning application history of the site along with a business rates summary valuation dated from 1 April 2017.

13. The 2003 planning permission (03/12635/FUL) was for a change of use of the ground to second floors to Class A2 (Financial Services) and alterations including a new shop front and the installation of a new ATM. There is however no evidence of what the change of use was from.

14. A further application was submitted and approved in 2007 (07/12600/FUL) for alterations to the shopfront. The appellant stated that the design and access statement, submitted with the application, references the long standing 'A

Class' use of the site and the already established A2 use, with the existing floor plan showing the original shop layout at ground floor level. The appellant concludes that on this basis the previously approved A2 use was never implemented.

15. Consequently, since there is no evidence that the A2 use was implemented and as the appellant concedes, the current use, which was operating at the date of the application, is not for A2 purposes, the proposed use as described in the application, would not be permitted by Part 3 Class G of the GPDO.

16. However, I accept the appellants point regarding such permitted development rights applying to both A2 and A1 uses, and it would have been open to me to seek agreement to amend the description. In such circumstances, for the proposed use to be permitted, the lawful use of the property, at the relevant date, would have to have been for A1 purposes.

17. The appellant contends that the current operation, trading since 2014, falls within Class A1 which the Council does not appear to dispute. However, whilst the 2014 (14/12727/FUL) permission was for the installation of a shopfront, which might indicate use for A1 purposes, there is no evidence that permission was for a material change of use to Class A1.

18. Consequently, whilst I acknowledge the permitted development rights to change from an A2 to A1 use, in the absence of evidence of a previously lawful A2 use, for the appeal to succeed, the appellant would need to demonstrate that the property has been used continuously and uninterrupted for A1 purposes for not less than ten years (s.171B(3) of the Act).

19. In this respect there is little evidence about the use of the property prior to 2014. Such evidence is limited to references to existing floor plans submitted with the 2007 application, those submitted with the 2014 application and, to a reference in the design and access statement to the last use of the building being within Use Class A1 with a clothing shop at ground floor; associated office, storage, and staff toilet on first floor; and associated office and storage at second floor.

20. None of the plans or design and access statement referred to have been provided. Nor do I have any specific details about any of the uses prior to 2014 for example, who previous occupants were, what their business was or how long they had occupied the property.

21. The business rates summary valuation is dated from 1 April 2017 and therefore does not cover the relevant period and, in any case is not determinative by itself.

22. Additionally, the Council stated that the upper floors of the building are in use as Class B1(a) (offices), indicating that plans submitted with the applications in 2020[2] showed that, and that they have photographs confirming this. Other than to state that the Council amended the description of the proposed development and references to use of the upper floors as storage and office use, there is no detailed evidence about the use of the upper floors.

23. The burden of proof rests with the appellant. Whilst the Council has provided little information of its own to contradict the appellants, the evidence provided

[2] 20/00235/FUL & 20/00236/FUL

by the appellant is not, of itself, sufficiently precise and unambiguous to demonstrate on the balance of probability that the use for Class A2 or A1 purposes is lawful. Consequently, in either case, the proposed use would not be permitted by Class G of Part 3 of Schedule 2 of the GPDO.

24. None of the above precludes the appellant seeking to establish the lawfulness of the use prior to any future re-application for a LDC for the proposed use.

Conclusion

25. For the reasons given above, I conclude that the Council's refusal to grant a certificate of lawful use or development was well-founded and that the appeal should fail in respect of; *change of use from class A2 financial and professional services to a mixed use of class A2 and two flats (class C3) is permitted development*. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Felicity Thompson

INSPECTOR