



Appeal Decision

Site Visit made on 19 July 2021

by M Savage BSc (Hons) MCD MRTPI

an Inspector appointed by the Secretary of State

Decision date: 6 September 2021

Appeal Ref: APP/T3725/X/21/3272762

Former Polestar Foods Ltd, St Mary's Road, Leamington Spa CV31 1QB

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by Leamington Central Ltd against the decision of Warwick District Council.
 - The application ref W/20/1683, dated 17 November 2020, was refused by notice dated 12 January 2021.
 - 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 'the building can be used entirely for Class B1 Use as a single unit; and the building can be used entirely for Class B1 Use as 5 No. Units'.
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Decision

1. The appeal is dismissed.

Preliminary Matters

2. The application was made under S191 of the Act for the use of the building as a B1 Use. The description of the existing use given on the application for is as: '*The building can be used entirely for Class B1 Use as a single unit; and the building can be used entirely for Class B1 Use as 5 No. units.*' The grounds for the application are that '*the building presently benefits from B1/B2/B8 use.*' Planning permission has also been granted under W/19/1355 for the sub-division of the existing unit to create 5 No. Class B1/B2/B8 Use units.
3. An application under S191(1) (a) of the Act seeks to establish whether any existing use of buildings or other land is lawful. Notwithstanding the Council dealt with the application under S191 of the Act, from the written evidence it appears that the appellant is seeking to determine whether the building can be used for a Class B1 Use. This is seeking confirmation of a prospective use, rather than a determination as to whether an existing use of the building is lawful. I wrote to the parties on this matter and the appellant agreed to my consideration of the appeal under section 192(a) of the Act.
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). The UCO created a new broad 'Commercial, business and service' use class (Class E) which incorporates the previous shops (A1), financial and professional services (A2), restaurants and cafes (A3) and offices and other business uses (B1) use classes. It is clear from the evidence that the appellant wishes to utilise the building for uses now incorporated within Class E(g) of Part A, Schedule 2 of the Town and Country Planning (Use Classes) Order 1987 (as amended). For simplicity, I shall continue to refer to a proposed B1 use.

5. The UCO includes transitional provisions, which retain the effect of the permitted development rights based on the classes that were in place prior to these regulations coming into force. A building or use will continue to be subject to any permitted development rights it was entitled to on or before 31 August 2020.
6. The Council dealt with the application on the basis that the building can be used entirely for Class B1 Use, as a single unit. However, the appellant applied for a determination as to whether the building can be used entirely for Class B1 Use as a single unit or in the alternative, entirely for Class B1 Use as 5 No. Units and I shall deal with the appeal on this basis
7. Planning permission was granted on 9 July 2021 for the change of use of 5 No. units from Class B1/B2/B8 to a flexible use comprising Class E(g) and/or Class B8. Since the decision was issued after the date of the LDC application, it has no bearing on my decision.

Reasons

8. An application under S192(1) of the Act seeks to establish whether (a) any proposed use of buildings or other land; or (b) any operations proposed to be carried out in, on, over or under land, would be lawful. S192(2) sets out that if on application under this section, the local planning authority are provided with information satisfying them that the use or operations described in the application would be lawful if instituted or begun at the time of the application, they shall issue a certificate to that effect.
9. In an LDC appeal, the onus is firmly on the appellant to make out their case, on the balance of probabilities. Planning merits form no part of the assessment of an application for a LDC under S192 of the Act. The proposed development must be considered in the light of the facts and the law.
10. The Council refused the application on the basis that there was insufficient evidence of a precise and unambiguous nature to demonstrate that the existing lawful use of the site is purely B1 Use Class and so the use of the site for purely B1 purposes would not be immune from enforcement action.
11. S55(2) sets out operations or uses of land which shall not be taken to involve the development of land. S55(2)(f) states in the case of buildings or other land which are used for a purpose of any class specified in an order made by the Secretary of State under this section, the use of the buildings or other land or, subject to the provisions of the order, of any part of the buildings or the other land, for any other purpose of the same class.

Previous activities

12. The appeal site comprises a substantial building located in a generally industrial area. The building was previously occupied by Polestar Foods Ltd and is stated to have been used for 'food production, storage, distribution and associated office activities'. The site was vacated a number of years ago and there has been no intervening use of the site since. The main thrust of the appellant's case is that the use of the site is a mixed use comprising B1/B2/B8 and can lawfully be used for any of the specified uses without a material change of use occurring.

13. Case law has established that the planning unit is usually the unit of occupation, unless a smaller area can be identified which, as a matter of fact and degree, is physically separate and distinct, and occupied for different and unrelated purposes. There are three broad categories of distinction: a) A single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary; b) A single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and c) The unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
14. The appellant has provided me with a copy of an email from an officer of the Council which states that the existing lawful use of the premises is B1/B2/B8. Whilst an officer of the Council advised what they considered the lawful use of the premises to be, a local planning authority may not fetter its discretion to issue an enforcement notice by any form of agreement. Sections 191-196 of the Act make provision for an appellant to determine whether planning permission is required and so it is not possible for an appellant to seek some informal determination in this regard.
15. Article 3(4) of the UCO states where land on a single site or on adjacent sites used as parts of a single undertaking is used for purposes consisting of or including purposes falling within the use described in Schedule 2, Class E, subparagraph (g) and Class B2 in Schedule 1 as modified by paragraph (1C)(b)¹, those classes may be treated as a single class in considering the use of that land for the purposes of this Order, so long as the area used for a purpose falling within Class B2, or Class B2 as modified, is not substantially increased as a result.
16. Since the site was occupied by one company, Polestar Foods Ltd, it seems likely that the unit of occupation was the entire site. However, there is very limited information as to how the building was used. Consequently, it is not possible to ascertain from the evidence why the parties consider the site was in a mixed use. Although the site was used for food production, storage, distribution and associated office activities, it seems likely from the appellant's description that some of these activities would have been ancillary or incidental to a primary use. However, it is not possible to determine from the evidence before me, whether this would have constituted a mixed use, a B1 use or some other combination of B1, B2 or B8 uses.

Whether planning permission W/19/1355 has been implemented

17. Planning permission was granted on 3 October 2019, for the sub-division of the existing unit to create 5 No. B1/B2/B8 units with associated access, parking and external alterations including partial demolition and re-cladding, reference W/19/1355. The appellant states that the planning permission is not considered to have been fully implemented, a point with which the Council concurs. The Council advise that the lawful use of the smaller units had not been commenced at the time of submission of the LDC application.

¹ For the purposes of the UCO as at 31 August 2021, including purposes falling within classes B1 and B2 in the Schedule

18. S55(1) of the Act sets out that development means *'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land'*. S55(1A) states for the purposes of this Act "building operations" includes: (a) demolition of buildings; (c) structural alterations of or additions to buildings; and (d) other operations normally undertaken by a person carrying on business as a builder. The Act states that 'building' includes any part of a building.
19. The planning permission comprises a number of elements: subdivision of the existing unit to create 5 No. B1/B2/B8 units with associated access, parking; and external alterations including partial demolition and re-cladding.
20. S56(1) sets out for the purposes of the Act development of land shall be taken to be initiated (a) *if the development consists of the carrying out of operations, at the time when those operations are begun; (b) if the development consists of a change in use, at the time when the new use is instituted; (c) if the development consists both of the carrying out of operations and of a change in use, at the earlier of the times mentioned in paragraphs (a) and (b).*
21. Whilst the units were unoccupied at the date of the application, both parties agree that at the time of making the application for the LDC, the physical works to the building, including external works, had commenced. At the time of my visit, I saw that part of the building had been demolished, external cladding had been erected and the building had been subdivided into a number of units. It would appear therefore, on the balance of probabilities, that development consisting of the carrying out of operations have begun and the planning permission has been implemented.
22. Where a condition is imposed on a grant of planning permission providing that the development should not be carried out except in complete accord with the approved plans, and the development is not built in accordance with those plans, there will be a breach of planning control consisting of a breach of the condition.

Whether conditions preclude the amalgamation of subdivided units

23. The parties advise that there are no conditions precluding the amalgamation of the subdivided units into one single unit. However, condition 2 attached to planning permission W/19/1355 requires the development to be carried out strictly in accordance with specified drawings, including drawing number 19-02-PL-201, which is the proposed ground floor plan. The plan identifies how the units are to be subdivided, with separating walls between the units. The removal of the separating walls would mean that the development would no longer be in accordance with drawing number 19-02-PL-201 and would therefore be in breach of condition 2.
24. The UCO as amended in 2020, Class E encompasses 'use, or part use, for all or any of the following purposes'. Thus, the UCO exempts from development any change of use from a single to a mixed use, or from one mixed use to another within class E, as well as a mix of E(g) and B2 uses in the circumstances described in Article 3(4). Otherwise, sites in mixed use do not benefit from the provisions of S55(2)(f).
25. The Council suggests in its officer report that a change of use was not sought in respect of application W/19/1355. However, S75(2) states that where planning

permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used. S75(3) states that if no purpose is so specified, the permission shall be construed as including permission to use the building for the purpose for which it is designed. The planning permission granted specifies B1/B2/B8 units and so the effect of the permission is to allow the building to be used for the B1/B2/B8 uses.

26. The use of the forward slash '/' between the different uses on planning permission W/19/1355 introduces an element of ambiguity. In my experience, it is generally used to denote 'and' 'or'. The meaning is not clear from the permission itself, or the accompanying documentation. However, both the Council and the appellant describe B1/B2/B8 as a mixed use. Since sites in mixed use do not benefit from the provisions of S55(2)(f), the use of the building for a B1 use would not benefit from the provisions of S55(2)(f).
27. Given the above, it has not been demonstrated, on the balance of probabilities, that the building can be used for Class B1² Use, either as a single unit or as 5 No. Units. Consequently, the appeal must fail.

Conclusion

28. Thus, for the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of the use of the building for Class B1 as a single unit or as 5 No. Units 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.

M Savage

INSPECTOR

² Now incorporated within Class E(g) of Part A, Schedule 2 of the Town and Country Planning (Use Classes) Order 1987 (as amended)