



Appeal Decisions

Site visit made on 5 January 2022

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 21st January 2022

Appeal A Ref: APP/Q5300/W/21/3277396 219 Whittington Road, Southgate N22 8YW

- The appeal is made under section 78 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant prior approval required under Article 3(1) and Schedule 2 [Part 3, Class M, paragraph M.2] of the Town and Country Planning (General Permitted Development) (England) Order 2015 (as amended) (the GPDO).
- The appeal is made by Benny Hoffman, Silver Assets Ltd against the decision of the Council of the London Borough of Enfield (the LPA).
- The application Ref 21/00101/PIA, dated 12 January 2021, was refused by notice dated 18 March 2021.
- The development proposed is the change of use from Class A2 to residential use (Class C3).

Summary of Decision: The appeal is allowed as prior approval is deemed to be granted.

Appeal B Ref: APP/Q5300/X/21/3277394 219 Whittington Road, Southgate N22 8YW

- 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 Benny Hoffman, Silver Assets Ltd against the decision of the Council of the London Borough of Enfield.
- The application Ref 21/01326/CEA, dated 8 April 2021, was refused by notice dated 3 June 2021.
- 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 change of use from the ground floor retail use (A1)/professional services (Class A2) to residential use (Class C3).

Summary of Decision: The appeal is allowed.

Costs

1. An application for costs was made by Benny Hoffman, Silver Assets Ltd against the Council of the London Borough of Enfield. This application is the subject of a separate Decision.

Procedural Matter

2. The Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 came into force on 1 September 2020 and had the effect of amending and simplifying the system of Use Classes within the Town and

Country Planning (Use Classes) Order 1987 (UCO). A use formerly falling within Class A1 and A2 now falls within Class E.

3. Nonetheless, the application for prior approval subject of Appeal A was submitted and determined in advance of the 31 July 2021 deadline set out under sub-paragraph (3)(c) of Paragraph M.2 to Part 3 of the Town and Country Planning (General Permitted Development) England Order 2015 (as amended). As such, the approval remains to be determined under Class M of the GPDO and its conditions and limitations.

Background

4. Article 3(1) of the GPDO grants planning permission for those classes of development defined as 'permitted development' in Schedule 2. Class M of Part 3 of Schedule 2 says that development consisting of (a) a change of use of a building from (i) a use falling within Class A1 (shops) or Class A2 (financial and professional services to a use falling within Class C3 (dwellinghouses) is permitted development. That is subject to the conditions set out in M.2 which include: (1) the requirement for the developer to apply to the local planning authority for a determination as to whether the prior approval of the authority will be required.
5. The appellant sought such prior approval from the LPA for the change of use of the appeal property from the ground floor retail use (Class A1) to residential use (Class C3) on 2 November 2020¹. That prior approval was refused by noticed dated 29 December 2020. The prior approval has since been granted on appeal on 9 July 2021².
6. A second prior approval for the appeal property was submitted on 12 January 2021 following the LPA's refusal of the first. The proposal was given on the application form as, "the change of use from the ground floor retail use (Class A2) to residential use (Class C3)." The request was accompanied by a written statement from the appellant.
7. The LPA wrote to the appellant on 20 January 2021, informing them that the form needed to be amended to match the use classes explained within the appellant's statement. The appellant amended the form and submitted it to the LPA on 21 January 2021. The revised description was "change of use from Class A2 to residential use (Class C3)".
8. The LPA refused to grant prior approval on for three reasons. Firstly, on the basis that the proposed use would be detrimental to the vitality, viability, sustainability and retail character of the Whittington Road Local Parade. Secondly, that in the absence of accessible cycle parking provision, the proposal would result in adverse impacts on transport and highways. Thirdly, that the lack of information in respect of refuse and recycling would result in an adverse effect on highway safety, traffic flows and visual amenity. That refusal was issued on 18 March 2021.
9. On the 8 April 2021 the appellant then submitted an application for an LDC for the change of use of the appeal property from the ground floor retail use (A1)/professional services (Class A2) to residential use (Class C3). The LPA refused that application on 3 June 2021.

¹ LPA Ref: 20/03582/PIA

² PINS Ref: APP/Q5300/W/21/3266224

10. The appellant subsequently submitted an appeal against the refusal of the second prior approval application on 20 June 2021. That appeal is the subject of Appeal A. An appeal against the refusal of the application for an LDC was also submitted on 20 June 2021. That appeal is the subject of Appeal B. Since the question of whether or not the proposal would have been lawful at the date the LDC application was made is dependent on the outcome of Appeal A, I will deal with the appeals in that order.

Appeal A

Preliminary Matters

11. Article 7 of the GPDO states that where, in relation to development permitted by any Class in Schedule 2, an application has been made to a local planning authority for prior approval or a determination as to whether such approval is required, the decision in relation to the application must be made by the authority – (a) within the period specified in the relevant provision of Schedule 2.
12. Paragraph W(11) of Part 3 of Schedule 2 of the GPDO states that the development subject of an application for prior approval must not begin before the occurrence of one of the following: (a) the receipt by the applicant from the local planning authority of a written notice of their determination that such prior approval is not required; (b) the receipt by the applicant from the local planning authority of a written notice giving their prior approval; or (c) the expiry of 56 days following the date on which the application under subparagraph (2) was received by the local planning authority without the authority notifying the applicant as to whether prior approval is given or refused.
13. The effect of Article 7 and Paragraph W of Schedule 2 is that where an application is made for a determination as to whether prior approval is required, the applicant can proceed with the development if the LPA does not notify the appellant of their decision within the statutory period. Prior approval is then deemed to be granted.

Main Issue

14. The main issue is therefore whether prior approval for the proposal is deemed to have been granted.

Reasons

15. The appellant says that the LPA failed to notify them of its decision on the prior approval application within the statutory period. The application was submitted to the LPA on 12 January 2021. According to the application receipt provided by the appellant, it was received by the LPA on 13 January 2021.
16. The decision notice was issued on 18 March 2021. That is 56 days from 21 January 2021. The officer report in respect of Appeal B states that the LPA considered the prior approval application had not been received by them in accordance with the requirements of paragraph W(11) of Part 3 of the GPDO until 22 January 2021 - the point at which the appellant amended the application form on 21 January 2021.

17. Paragraph W(2) of Part 3 of the GPDO states that an application must be accompanied by: (a) a written description of the proposed development, which, must include any building or other operations; (b) a plan indicating the site and showing the proposed development; (c) the developer's contact address; and, (d) the developer's email address.
18. The appellant's submissions of 12 January 2021 were made on the LPA's standardised form. Contact details pursuant to paragraph W(2)(c) and (d) were given on the form. Plans indicating the site and showing the proposed development pursuant to paragraph W(2)(b) were submitted in the form of a location plan and existing and proposed floor plans.
19. A written description of the proposed development was given as, "change of use from ground floor retail use (Class A2) to residential use (Class C3)." With that, the appellant also submitted a planning statement. It is explained within the statement that the first prior approval process highlighted that the property was in a use which falls within Class A2 rather than A1, hence the appellant's use of Class A2 on the description on the form. The appellant nevertheless maintained that, whilst the use fell within Class A2, it was a retail use. The statement is clear that the proposed development is a change of use to a dwellinghouse (Class C3).
20. I note that prior to the introduction of Class E in the UCO, Class A1 and Class A2 were separate use classes. However, Class M allows for a change of use from A1 or A2, so the existing use would have little consequence for consideration of the proposal. Moreover, paragraph W(11) requires a written description of the proposed development, emphasising the importance of the proposed use rather than the existing.
21. Overall, it seems to me that the appellant provided an adequate and clear written description of the proposed development pursuant to paragraph W(2)(a) of the GPDO in their submissions on 12 January 2021 which were received by the LPA on 13 January 2021.
22. The LPA said in its letter on 20 January 2021 that, "I note you have explained the use classes within your statement, however, the form needs to be amended to match". However, it was held in *Murrell v SSCLG* [2010] EWCA Civ 1367 that it is not mandatory to use a standard form or provide any information beyond that specified in the GPDO. In *Murrell*, handling mistakes by the LPA and the fact that the applicant submitted a new form and further plans (as requested) did not stop the clock running.
23. As a result, assuming a receipt date of 13 January 2021, the 56 day statutory deadline expired on 10 March 2021. Given the LPA's notification was not issued until 18 March 2021, it follows that requirement under Article 7(a) to make the decision within the 56 day period specified in paragraph W(11) of Part 3 was not adhered to. Consequently, prior approval is deemed to be granted under W(11)(c).
24. The development could only lawfully proceed if it is in accordance with the submitted plans and is permitted development having regard to the relevant conditions and limitations imposed on the planning permission granted by the GPDO. That is a matter which is relevant to Appeal B.

Conclusion

25. For the above reasons and having regard to all matters raised, I conclude that the failure of the Council to make a determination on the application within the prescribed period means that prior approval is deemed to be granted.

Appeal B

Preliminary Matter

26. Article 3(1) of the GPDO grants planning permission for the change of use from a use falling within Class A1 (shops) or Class A2 (financial and professional services) to a use falling within Class C3 (dwellinghouses) under Class M of Part 3 of Schedule 2. Whilst Class A1 and A2 uses now fall within Class E of the UCO, since the LDC application subject of this appeal pre-dated the 31 July 2021 deadline in the GPDO, I will continue to determine the application in accordance with Class M and its references to A1 and A2 uses.

Main Issue

27. The main issue is whether the LPA's decision to refuse the application for an LDC was well-founded. Particular regard is had to whether the development would be granted planning permission by Article 3(1) of the GPDO as permitted development under Class M of Part 3 of Schedule 2.

Reasons

28. The Council's decision notice says the proposal was not lawful because written notice was served in respect of the prior approval within the statutory 56 days. There is no indication that the Council considers the proposal would not meet any other limitations or conditions under Class M.
29. In terms of the prior approval matter, there is no indication that the LPA failed to notify the appellant of its decision in respect of the first prior approval in 2020 within the 56 days. The decision was issued 56 days following receipt by the LPA. Thus, the fact that the LPA had refused prior approval means the LDC proposal would not have achieved lawfulness through the first prior approval. Whilst it was subsequently allowed on appeal and prior approval granted, that was not until 19 July 2021, after the relevant date of the LDC application of 8 April 2021.
30. However, as can be seen from Appeal A, I have determined that the prior approval submitted in January 2021 was deemed to have been granted due to the LPA's failure to notify the appellant of its decision within 56 days of receipt. Thus, the requirements of condition M.2(2) were met prior to the date the LDC application was made.
31. Nevertheless, the Court of Appeal's found in *Keenan v Woking BC & SSCLG [2017] EWCA Civ 438* that development cannot become permitted development by default if the LPA does not determine a prior approval application within the statutory period. In determining lawfulness, one must consider whether the proposal meets the parameters, limitations or conditions set out under Class M the GPDO.
32. The LPA has not submitted a statement in respect of the appeal. Its officer report in respect of the LDC application addresses only the point regarding the timing of the prior approval. There is no indication that the LPA believes the

proposal would fail to meet any other limitation or condition set out under Class M. Indeed, the officer report explicitly states that the sole issue in respect of the LDC application is the matter of the 56 day period.

33. I note the Inspector's finding in the appeal relating to the first prior approval that the "evidence indicates that the proposal meets the requirements of paragraph M.1 of the GPDO." I have no reason to believe that the proposal here would not meet the limitations of paragraph M.1 or fail to meet the conditions under M.2.
34. As a result, at the date the LDC application was made, the proposed development would have been granted planning permission by Article 3(1) of the GPDO. Thus, no enforcement action may have then been taken. Nor would the proposed use constitute a contravention of any of the requirements of an enforcement notice then in force. Consequently, the proposed use would have been lawful at the date the application was made.

Conclusion

35. For the reasons given above I conclude, on the evidence now available, that the Council's refusal to grant a certificate of lawful use or development in respect of the change of use from the ground floor retail use (A1)/professional services (Class A2) to residential use (Class C3) 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 as amended.

Formal Decisions

Appeal A

36. The appeal is allowed and prior approval is deemed to be granted under the provisions of Schedule 2, Part 3, Class M of the GPDO for the change of use from Class A2 to residential use (Class C3) at 219 Whittington Road, Southgate N22 8YW in accordance with the terms of application Ref 21/00101/PIA, dated 12 January 2021, and the plans submitted with it.

Appeal B

37. 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.

J Whitfield

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 8 April 2021 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:

The proposed use would be granted planning permission by virtue of Article 3 of the Town and Country Planning (General Permitted Development) (England) Order 2015 for development permitted under the provisions of Class M of Part 3 of Schedule 2.

As a result, at the date the application was made, no enforcement action could have been taken in respect of the proposed use. In addition, the proposed use would not have constituted a contravention of any of the requirements of an enforcement notice then in force.

Signed

J Whitfield

Inspector

Date: 21st January 2022

Reference: APP/Q5300/X/21/3277394

First Schedule

Change of use from the ground floor retail use (A1)/professional services (Class A2) to residential use (Class C3).

Second Schedule

Land at 219 Whittington Road, Southgate N22 8YW

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: 21st January 2022

by J Whitfield BA (Hons) DipTP MRTPI

Land at: 219 Whittington Road, Southgate N22 8YW

Reference: APP/Q5300/X/21/3277394

Scale: Not to scale.

