The Planning Inspectorate

Appeal Decision

Site visit made on 4 January 2022

by J Whitfield BA (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 2nd February 2022

Appeal Ref: APP/Q5300/X/21/3278743
Unit 7, Sovereign Business Centre, 33 Stockingswater Lane, Enfield EN3 7JX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 (the Act) 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 Sophoclis Sophoclis, Ecologic against the decision of the Council of the London Borough of Enfield (the LPA).
- The application Ref 20/01770/CEA, dated 8 May 2020, was refused by notice dated 6 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 change of use of first floor from office use (B1a) to 6 residential units (C3).

Decision

1. The appeal is dismissed.

Preliminary Matters

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 with the Town and Country Planning (Use Classes) Order 1987 (UCO). A use formerly falling within Class B1(a) now falls within Class E. Nonetheless, the LDC application was made prior to the coming into force of the regulations. Thus, the LDC must be determined on the basis of the legislation in place at the date the application.

Main Issue

3. The planning merits of the proposed development are not relevant in an appeal against a refusal of an LDC application. The main issue is whether the LPA's decision to refuse the LDC application was well-founded. Particular regard is to be had as to whether the proposed development would be granted planning permission by Article 3(1) of the Town and Country Planning (General Permitted Development) (England) Order 2015 (the GPDO).

Reasons

4. The appeal relates to a two-storey unit located within a business park. The LDC application sought confirmation that, at the date the application was

made, the change of use of the first floor of the building from an office use to six residential units would have been lawful.

5. Section 191(2) of the Act states that uses are lawful at any time if (a) no enforcement action may then be taken in respect of them (whether because they did not involvement development or require planning permission or because the time for enforcement action has expired or for any other reason); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

6. Article 3(1) of the GPDO grants planning permission for those classes of development described as permitted development in Schedule 2. Class O of Part 3 of Schedule 2 sets out that the change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices of the Schedule to the Use Classes Order to a use falling within Class C3 (dwellinghouses) is permitted development.

7. Paragraph O.1(b) sets out that development is not permitted by Class O if it was not used for a use falling within Class B1(a) on 29 May 2013. The LPA's position is that there is insufficient evidence to demonstrate that the building was in use for offices on or before 29 May 2013 in accordance with paragraph O.1(b) and thus cannot benefit from the permitted development right.

8. The building was constructed as part of a development granted planning permission in 1988[1] comprising nine business units for B1, B2 and B8 use. Conditions attached to that permission state that the office content of any of the units shall not exceed 50% of the total floor area of that unit and each unit shall not be subdivided for occupation by more than one occupier.

9. The appellant indicates that the use of the unit has remained unchanged since the original planning permission was granted. At the date the LDC application was made it is said that the ground floor of the building was in use as light industrial under Class B1(c). It is also indicated that the use falls between the storage and warehouse use granted under the original planning permission. The first floor is said to be in an office use under Class B1(a).

10. The appellant suggests that the ground floor use is incidental to the first floor office use and thus the current use of the building falls within Class B1(a). However, the evidence regarding the operation of the unit is very limited and the appellant has not indicated why they consider the ground floor to be ancillary or incidental to the office use of the first.

11. My site visit was unaccompanied and thus I did not make an internal inspection of the premises. Nevertheless, I was able to see that signage for only a single company was displayed on the front of the premises. The sign was hung between the ground and first floors of the building. Moreover, the proposed plans show that both the ground floor and first floor are accessed by the same set of external double doors. The Council also points to the business rates for the premises which have been classified as workshop and premises since 1 April 2014. Indeed, I note there is one address which covers the whole unit whilst the appellant refers to the entire building as the "unit" rather than "units". Furthermore, the floor space is also broadly split equally between the two uses. Thus, it seems to me that on the evidence before me, the uses

[1] LPA Ref: TP/88/0557

comprise two primary uses within a single planning unit where neither is ancillary to the other.

12. As a result, I find, as a matter of fact and degree, that the building was in use as a mixed use of B1(a) and B1(c) at the date the LDC application was made. A mixed use is a single mixed use and thus 'sui generis' and outside of any use class. The appellant indicates that the use of the property has not changed since it was constructed, these leads me to conclude that this was the arrangement on 29 May 2013.

13. On that basis, the proposed use would fail to meet the limitation under paragraph O.1(b) and therefore the development would not be permitted development under Class O.

14. Condition O.2(1) states that development under Class O is permitted subject to the condition that before beginning the development, the developer must apply to the LPA for a determination as to whether the LPA's prior approval is required. Paragraph W sets out the procedure for prior approval under Part 3. Paragraph W(11) states that the development must not begin before the occurrence of one of the following: (a) the receipt by the applicant from the LPA of a written notice of their determination that such prior approval is not required; (b) the receipt by the applicant from the LPA of a written notice giving their prior approval; or (c) the expiry of 56 days following the date on which the application was received by the LPA without the authority notifying the applicant as to whether prior approval is given or refused.

15. The appellant applied for prior approval for the development on 18 October 2019. The LPA did not determine the prior approval until 29 February 2020. The LPA accepts that it did not determine the prior approval within the requisite 56 day period. The appellant says that the development would, therefore, have been lawful on the date the LDC application was made as the failure of the LPA to notify the appellant whether prior approval was given or refused in accordance with the 56 day time period under Paragraph W(11)(c) of Part 3 means the development was able to begin.

16. However, whilst a failure to determine the prior approval application within the prescribed period means prior approval is deemed to be granted and allows a change of use to be carried out, the change of use cannot be lawful if it fails to meet the parameters, limitations or conditions set out under Class O the GPDO. That approach is supported by the findings of the Court of Appeal in *Keenan*[2]*.* As such, given that the development in this case fails to meet the limitations of Class O, it would not have been lawful as it would not have been granted planning permission by virtue of Article 3(1) of the GPDO.

17. The appellant refers to several appeal decisions in support of their position. However, none of those cases appear to relate to the consideration of an LDC and the primary issue as to whether a proposed development would have been lawful on the date the application was made.

18. Overall, since enforcement action may have been taken as the proposal involved development for which planning permission was required and for which none was granted, the development was not lawful at the date the LDC application was made.

[2] *Keenan v Woking BC & SSCLG [2017]* EWCA Civ 438

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 the change of use of first floor from office use (B1a) to 6 residential units (C3) 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.

J Whitfield

INSPECTOR