Appeal Decision

Site visit made on 5 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/21/3278751
Unit 8, Sovereign Business Centre, 33 Stockingswater Lane, Enfield EN3 7JX

- 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 James Munns, Munns Group against the decision of the Council of the London Borough of Enfield (the LPA).
- The application Ref 20/01891/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 ground and first floor from office use (B1(a)) to 4x 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.

4. The main issue is whether the LPA's decision to refuse the LDC application was well-founded. Particular regard in this case is to be had 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

5. The appeal relates to a two storey, terraced property located within a business park where some of the properties have been converted to residential units.

6. The proposal here is to change the use of the property to four dwellings. 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) to a use falling within Class C3 (dwellinghouses) is permitted development. That is subject to the limitations set out under paragraph O.1. O.1(b) states development is not permitted if the property was not used for a use falling within Class B1(a) on 29 May 2013.

7. The property was originally constructed as a result of a planning permission granted in 1988 for nine business units[1]. Condition 9 of that permission restricted the office content of any units to a maximum of 50% of the total floor area. In 2001, an application vary condition 9 was granted on 13 December.[2] It is indicated that this variation allowed for the change of use of the ground floor of the unit to office use.

8. The appellant indicate that the change of use of the ground floor to office was implemented in 2004, pointing to a building regulations approval for completion of the conversion having been granted on 21 May 2004. As a consequence of those works, the appellant states that entire property was in use as a Class B1(a) office and has been in continuous use as such since that time.

9. However, no documentary evidence of the building regulations approval has been provided. Moreover, there are no invoices or other records of the works having been undertaken. Furthermore, no photographs of the premises have been provided. Indeed, there are no details at all provided regarding the current use of the building and how it operates. I did not enter the property on my site visit since the appellant indicated that I would be able to see relevant parts of the appeal site sufficiently to judge the proposal from public land. In any case, any observations I were to make on my site visit would not have provided evidence of use on or before 29 May 2013.

10. The appellant suggests that regardless the use of the ground floor for a storage/warehouse use has been incidental to the primary use of the entire premises as offices.

11. However, the appellant indicates that the property has been used in accordance with the original permission from the outset. The original 1988 permission related to storage/workshop use and was subject to a condition requiring no more than 50% of the floor space to be in use as an office. In any event, the appellant has provided very limited evidence regarding the actual use of the ground floor and whether or not it was ancillary to the office use above.

12. The floor space was split 50/50 between the two uses. Moreover, the original 1988 permission with which the appellant says the property has operated in accordance with contained a condition restricting the sub division of the units. In addition, the floor plans show a single unit with no evidence of sub division. As such, this suggests the property has been a single planning unit throughout and the little evidence I have points towards the property being in a mixed use

[1] LPA Ref: TP/88/0557
[2] LPA Ref: TP/01/0845

of office and storage/workshop. Mixed uses do not fall within any particular use class.

13. Whilst the LPA has not provided evidence of its own to counter that of the appellant, ultimately the burden proof falls on the appellant. In this instance, I find the evidence of the appellant is not sufficiently precise or unambiguous. As a result, the limited evidence before me suggests that, on the balance of probabilities, the property was not solely in use as B1(a) office space on 29 May 2013.

14. Consequently, the evidence before me indicates that the proposed use would fail to meet the limitation under paragraph O.1(b). As such, the development would not be permitted development under Class O.

15. 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.

16. The appellant applied for such prior approval for the development on 29 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.

17. However, whilst a failure to determine the prior approval application within the prescribed period means prior approval is deemed to be granted, 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*[3]*.* As such, given that I have found the proposal would fail to meet the limitations of Class O, it would not have been lawful at the date the LDC application was made since it would not have been granted planning permission by virtue of Article 3(1) of the GPDO.

18. 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.

19. 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);

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

and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force.

20. In this instance, the use would not constitute a contravention of any of the requirements of any enforcement notice in force. However, since enforcement action may have been taken as the proposal involved development for which planning permission was required but for which none was granted, the development was not lawful at the date the LDC application was made.

Conclusion

21. 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 ground and first floor from office use B1(a) to 4x 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