The Planning Inspectorate

Appeal Decision

Site visit made on 12 July 2022

by Richard S Jones BA(Hons), BTP, MRTPI

an Inspector appointed by the Secretary of State

Decision date: 10 August 2022

Appeal Ref: APP/A3655/X/21/3271643
2A Eden Grove Road, Byfleet, West Byfleet, KT14 7PH

- 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.
- The appeal is made by Mr Nick Constable against the decision of Woking Borough Council.
- The application ref PLAN/2021/0071, dated 30 December 2020, was refused by notice dated 17 March 2021.
- The application was made under section 191(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 Class E(a) use for the display or retail sale of goods, other than hot food, principally to visiting members of the public, formerly Class A1 use.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. An application under S191(1)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act) seeks to establish whether, at the time of the application, any existing use of buildings or other land is lawful. Planning merits, including matters relating to drainage, or the personal circumstances of the appellant can form no part of the assessment of an application for a lawful development certificate (LDC), which must be considered in the light of the facts and the law. The burden of proof lies with the appellant to make his case and the relevant test is 'the balance of probabilities' (that it is more probable than not).

3. I have taken the description for the LDC sought from the note referred to in the application form, which, essentially, is to use the premises for Class E(a) purposes. Class E(a) is a use for the display or retail sale of goods, other than hot food, principally to visiting members of the public. It forms part of a new broad 'commercial, business and service' use Class E that incorporates a number of former classes, including A1 (shops), which came into force on 1 September 2020 as part of the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. As part of my reasoning, I refer to both Class A1 and Class E, depending on which was in force at the point of reference.

Main Issue

4. The main issue is whether the Council's decision to refuse to issue a LDC for the use of the premises for Class E(a) purposes was well-founded.

Reasons

5. The appeal relates to a single storey building and yard area, which extends from the rear of a two storey, end of terrace property at No 17 Brewery Lane.

6. It appears undisputed that the ground floor of No 17 (hereafter referred to as the main terrace building), was previously used as a shop falling within former Class A1 and that the single storey extension within the appeal site was used for storage purposes - ancillary to that use. Indeed, the appellant refers to an informative contained within the decision notice for the appeal LDC and a previously refused LDC[1], which state that "[a]*t the time of determination it has been found that the front portion of the ground floor of the planning unit, subject to this application, has been unlawfully converted to a C3 Use Class. This portion of the ground floor as well as the rear portion subject to this application are considered to be one planning unit with a lawful use of A1 with A1 ancillary storage space (relating to the rear single storey section of this building).*"

7. Reference is also made to other Council documents including the officer report for a prior approval granted in September 2017[2], which similarly referred to the building together with the ancillary rear extension being in use as a shop within Class A1 use.

8. Therefore, on the balance of probabilities, the two elements, consisting of the main terrace building and the single storey extension, would have amounted to a single planning unit in Class E(a) use.

9. However, the prior approval granted was for the change of use from Class A1 to four Class C3 dwellings (three located in the rear extension and one in the main terrace building). The appellant explains that the latter unit has been completed and occupied as a dwelling, but that it was said (presumably by the Council) that the rear extension was being developed inconsistently with the approved plans.

10. In any event, an enforcement notice was subsequently issued on 24 January 2020, which alleged, amongst other matters, the material change of use of part of the land from retail (Class A1) with ancillary storage to a mixed use of retail (Class A1) and residential (Class C3), by creating three separate flats in the single storey building. An appeal against the notice was dismissed on 9 June 2020[3] and the enforcement notice was upheld, with the allegation corrected to "*the material change of use of part of the Land to residential (Class C3) by creating x3 separate flats….*"

11. S191(2) of the 1990 Act states that uses are lawful if (a) 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); and (b) they do not constitute a contravention of any of the requirements of any enforcement notice then in force. As the enforcement notice sought to address the Class C3 use, rather than the Class A1 use, s191(2)(b) would not bite in this case.

[1] Reference: PLAN/2020/0904 - *Lawful Development Certificate (Existing Use) to establish whether the use of the application building as an A1 Use Class had began more than 10 years before the date of this application and has not changed use* – Refused 14 December 2020
[2] Reference: PLAN/2017/0799 - *Prior approval for a proposed change of use of a part of retail units (class A1/A2) to 4no one-bedroom dwellings (class C3)*
[3] Appeal Reference: APP/A3655/C/20/3247924

Moreover, s57(4) of the 1990 Act provides that where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which it could lawfully have been used if that development had not been carried out.

12. However, the enforcement notice did not seek to address the residential use of the ground floor of the main terrace building, where the primary aspect of the Class E(a) shop was located. Although the rear extension was previously used for ancillary Class E(a) storage it does not necessarily follow that it has a Class E use in its own right. In this case, the lawfulness of the single storey rear extension for Class E purposes effectively relies on the existence of the primary retail element in the main terrace building, which doesn't fall within the appeal site boundary. If, at the time of the application, that primary use had ceased, the ancillary use does not endure, as an ancillary use cannot exist in the absence of the primary use as there is nothing to be ancillary to. The appellant is therefore incorrect to assert that the LDC decision does not need to concern itself with the use of the main terrace building in the circumstances of this case.

13. The Class E use of the single storey extension could endure if it was used for primary retail purposes as part of the wider planning unit with the main terrace building. However, no evidence is provided to that effect, or that it was in Class E use in its own right, thereby creating a separate planning unit. Indeed, the appellant appears to confirm that there had been no subdivision of the planning unit. Representation from a neighbouring resident of more than 30 years also states that the building has always been used for storage and nothing more.

14. Consequently, it has not been shown that the single storey building and yard has been used for a primary Class E use, either as part of the main terrace building or as a separate planning unit for a period of at least ten years prior to the date of the LDC application, so as to obtain immunity from enforcement action through the passage of time[4]. Nor is it argued that the creation of a separate planning unit would not amount to development requiring planning permission. Indeed, it is more likely than not that there would be a material change of use of a building from ancillary Class E(a) storage to a separate Class E unit, due to the likely changes in character and its effects.

15. I have noted the appellant's concerns over the appeal decisions submitted by the Council but there are parallels which can be drawn. In the Downs Road case[5] an outbuilding was found to be ancillary to the retail use of the main building and on that basis was in Class A1 use. However, the Inspector opined that it did not appear as though such a use could exist without the Class A1 use of the main building, which at that time was being used for self-contained dwellings following a grant of prior approval for the change of use from Class A1. It therefore seemed to that Inspector that a Class A1 use of the outbuilding was dependent on there being an existing Class A1 use at the main building. As the residential use of the main buildings started a new chapter it its planning history, the former Class A1 use was lost. It therefore followed that the outbuildings could not have an ancillary Class A1 use. The Inspector for the Hertford Road[6] appeal decision applied similar reasoning in that case.

[4] S171B(3) of the 1990 Act
[5] Appeal Reference: APP/Q5300/W/19/3226046
[6] Appeal Reference: APP/Q5300/W/21/3272336

16. In this case, there appears to be dispute over the lawfulness of the change of use of the main terrace building from a shop to residential use, despite the previous prior approval. In any event, even if the main terrace building could lawfully revert back to Class E use, that does not assist the appellant's case because lawfulness is determined at the date of the application. On the balance of probabilities, the evidence points to that part of the planning unit having been materially changed to Class C3 use at that time. Consequently, there was no Class E use to be ancillary to.

17. It has not therefore been demonstrated, on the balance of probabilities, that no enforcement action could be taken against the use of the single storey extension and yard for Class E(a) purposes on the date of the LDC application.

Conclusion

18. For the reasons given above I conclude that the Council's refusal to grant a LDC was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in s195(3) of the 1990 Act as amended.

Richard S Jones

INSPECTOR