



Appeal Decision

Site visit made on 25 October 2022

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

an Inspector appointed by the Secretary of State

Decision date: 06 January 2023

Appeal Ref: APP/C1950/X/21/3280927

Land parcel east of Newgate Street. Barn located south of Lodge Farm with the nearest postcode being SG13 8NQ, which is located in East Herts District.

- 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 Mr Leslie Lord against the decision of Welwyn Hatfield Council.
 - The application ref 6/2021/0457/LAWE, dated 10 February 2021, was refused by notice dated 25 June 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 retention of barn as a B8: Storage and Distribution warehouse for a period of more than 10-years.
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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. S191(2)(a) of the Act explains that uses are lawful if no enforcement action may be taken in respect of them because they did not involve development or require planning permission or because the time for enforcement action has expired.
3. The burden of proof lies with the appellant and the relevant test is 'the balance of probabilities' (that it is more probable than not). If there is no evidence to contradict or make the appellant's version of events less than probable and his evidence alone is sufficiently precise and unambiguous, that is enough. Evidence should not be rejected simply because it is uncorroborated.

Main Issue

4. The main issue is whether the Council's decision to refuse to issue a LDC for the use of the building under Class B8 of the UCO¹ as a storage and distribution warehouse was well-founded. From the evidence before me, that turns on:
 - whether the use of the building changed to use under Class B8 of the UCO as a storage and distribution warehouse at least ten years before the date of the LDC application (10 February 2011) and then continued without material interruption for a period of at least ten years thereafter, so as to

¹ The Town and Country Planning (Use Classes) Order 1987 (as amended)

meet the immunity period from enforcement action under s171B(3) of the 1990 Act; and

- whether there was positive deception which disentitles the appellant from relying on the provisions of s171B(3).

Reasons

Use

5. Prior approval for an agricultural barn was granted on 30 October 2006 under reference S6/2006/1310/AG. The appellant explains that was sought in good faith, but plans changed, due to ill health, away from an agricultural barn for his own use, to the construction of a barn for general commercial use.
6. The statutory declaration (SD) made by the appellant, states that Fosters Pet and Garden Centre Limited rented the building between May 2010 to May 2011 as a storage and distribution centre for their business as importers and distributors of Epsom salts. A tenancy agreement is exhibited for the use of the premises solely for those purposes.
7. The SD goes on to explain that the tenants initially took on a lease for one year but under its terms carried on as tenant up to 30 November 2017 when they left for other premises. As the SD is signed, dated and witnessed by a solicitor, I attach significant weight to it. It is also corroborated by the purported SD of the commercial estate agent instructed by the appellant. As that is not witnessed by a solicitor, then it is not a SD. Nevertheless, no evidence is provided by the council which contradicts the appellant's version of events.
8. The appellant's SD further states that from January 2018 up to date of the SD on 23 September 2020, the building was leased by GIS Industrial Supply Co. Limited for the importation, storage and distribution of personal protective equipment. A three year lease agreement dated 20 March 2018 is exhibited. The permitted use is warehouse for storage and distribution purposes within Use Class B8. Although that is signed by the appellant, it is not signed by the tenant. Nevertheless, the statement from the commercial agent confirms that to be factually true and, again, there is no contradictory evidence from the Council.
9. Combined, the use of the building by the two tenants between May 2010 and September 2020 amounts to a period in excess of 10 years. Although there is a gap between the two tenancies of around one month, that does not amount to a material interruption between finding and accommodating commercial tenants. Moreover, it is confirmed that GIS Industrial Supply Co. Ltd continued to lease the building up to the point of the application (and appeal). That is not disputed by the Council so there is no suggestion that there has been a subsequent material change of use of the building.
10. Although the SD by Mr S Cookson states that he was familiar with the site from 1997 to 2016, no specific reference is made to the LDC building or its use for storage or distribution. The SD therefore provides no assistance to the appellant's case in that regard.
11. Nevertheless, I am satisfied that the appellant has demonstrated, on the balance of probabilities, that the building has been used for Class B8 storage or

distribution for a period of more than ten years before the date of the application, without material interruption.

12. Crucially however, S171B(3) states that '*no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach*'. For a breach of planning control to have occurred in this case, there must have been a material change of use and it is only a material change of use which can have become immune from enforcement action. Having regard to s171A(1), use, in itself, is not an act of development.
13. As explained by the appellant, following completion of the building, it was used for Class B8 purposes. Therefore, on the balance of probabilities, there was no material change of use of the building to Class B8 storage and distribution, at least ten years before the date of the LDC application; it was used for such purposes from the onset. Consequently, the use of the building is not lawful on the basis that it has become immune from enforcement action under s171B(3) of the 1990 Act.
14. Having regard to the application description, the evidence submitted is largely focused on the building. It will be a matter for the appellant to decide whether to pursue a new LDC application for the material change of the use of the land on which the building has been constructed. It is not for me to comment on the merits of any such application.

Whether there was positive deception

15. Whilst, having regard to my above finding, it is not strictly necessary for me to determine this issue, I will do so given the Council's reason for refusing the LDC application.
16. In the case of *Welwyn Hatfield*² the Supreme Court held that the actions of the developer amounted to '*positive deception in matters integral to the planning process...[which] was directly intended to and did undermine the regular operation of that process*'. The deliberate concealment of the dwellinghouse in that case meant that the developer could not rely on the time limits for taking enforcement action in s171B of the 1990 Act.
17. It was emphasised in *Welwyn Hatfield* and later cases that this principle should only be applied in extreme cases. Local planning authorities and Inspectors ought not to cast around for marginal aspects of cases to rely on the principle; the appellant must do more than 'keep a low profile'³. However, in *R (oao Matilda Holdings Ltd) v SSCLG*⁴, it was held that there are no 'exceptionality' or 'egregious' tests for determining whether there has been deliberate concealment.
18. The prior approval plans show a five-bay pitched roof building. On the north-east long elevation, three of the bays are shown to be open and two are shown with roller shutters. Five roof lights are shown above each bay on the north-east pitch. No other openings are shown on either gable end elevations or on the long south west elevation.

² *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15; [2011] JPL 1183;

³ *Jackson v SSCLG & Westminster CC; Bonsall v SSCLG & Rotherham MBC* [2015] EWCA Civ 1246

⁴ [2016] EWHC 2725 (Admin)

19. However, the appellant's SD states that the building was completed in March 2009 as per the LDC drawings and a contemporaneous invoice is exhibited which shows the balance for a new building, addressed to the appellant. In contrast to the prior approval drawings, the LDC plans show the main entrance (double sliding doors) on the previously blank north-west elevation and instead of five openings on the long north east elevation, that elevation is shown as blank and fully enclosed⁵.
20. Those are obvious and material differences which, even with the same green profiled cladding, would have been readily apparent to the Council if they had visited the site. The physical form of the building does not therefore point towards deliberate concealment.
21. I appreciate that the design of the building could conceal its internal use but that is by no means a unique characteristic. Whilst it could well be taken for an agricultural building, it cannot be reasonably physically mistaken for that which was approved. In any case, the main doors would need to be opened and goods moved in and out for a storage or distribution use.
22. I saw that the site is generally well screened from public vantage points so it makes it less likely that any breach of planning control would have been picked up by the Council (or any other observer) without being within the vicinity of the building. However, that in itself cannot amount to deliberate concealment and the reasonable preclusion of s171B(3) of the 1990 Act as such situations would be encountered on numerous occasions throughout the country. Moreover, I am unaware of any positive actions to deceive the Council by attempting to physically conceal the building⁶, or its use.
23. I note the Council's inference that because the SD of Mr Cookson does not mention a commercial use of the building, that appears to demonstrate that if commercial activities were occurring, they were not being carried out in a way which was obvious to a regular visitor to the site. Although that in itself is not an unreasonable supposition, the SD does not appear to address the LDC building at all.
24. Whilst the appellant's marketing particulars are undated, the statement from the commercial agent confirms that they were produced in 2009 when his firm was instructed to market the building. His name also tallies with that given as the contact for viewing appointments in the particulars.
25. Moreover, those particulars describe the unit as a detached storage building to let with pictures reflecting the LDC design, rather than the prior approval. That adds weight to the evidence that it was originally built out as per the former, rather than the latter. The location is described in detail on the second page of the particulars along with features and dimensions. Such marketing, in the public domain, does not therefore point towards a deliberate concealment of the use of the building.
26. I note the Council highlights that the appellant is unable to provide records of the business rates for the premises and that it appears that the Valuation Office Agency (VOA) has no records of the building. The Council do not consider it to be an unreasonable expectation to be able to produce such documentation

⁵ Save for the roof lights on both pitches and a conventional door in the south-east elevation, the LDC plans reflect the building on site at the time of my site visit

⁶ *R (oao Fidler) v SSCLG & Reigate and Banstead BC* [2011] EWCA Civ 1159

if a commercial activity has occurred for over 10 years, and the failure to do so raises questions that the use was intentionally concealed from the VOA, thereby amounting to another example of deliberate deception.

27. However, the submitted tenancy agreements place the burden on paying any rates onto the tenants. The appellant's position is that he had no prior knowledge of that contractual breach before the Council raised the matter during the determination period, and therefore he had no opportunity to deceive the Council. Even if that were not the case, such failures are more akin to acts of passive omission and '*keeping a low profile*' rather than positive deception.
28. Moreover, I have not been made aware of any deliberately misleading or false statements made by the appellant to prevent or deter discovery of the use. Nor does the evidence point towards positive conduct on the appellant's behalf to deceive the Council and undermine the planning process.
29. For the reasons explained, I do not find a situation in which there has been positive deception so as to engage the '*Welwyn principle*' and the appellant is not disentitled from relying on the provisions of s171B(3) of the 1990 Act.

Conclusion

30. Although, on the balance of probabilities, I have not found positive deception, the use of the building is not lawful on the basis that it has become immune from enforcement action under s171B(3) of the 1990 Act.
31. I therefore 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 section 195(3) of the 1990 Act as amended.

Richard S Jones

INSPECTOR