
Appeal Decision

by Roy Curnow MA BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 3rd October 2023

Appeal Ref: APP/V1260/X/23/3320002

Unit 7, Christchurch Trade Park, 143-147 Somerford Road, Christchurch BH23 3PY

- 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 Mark Yarde of Consol Ltd against the decision of Bournemouth Christchurch and Poole Council.
 - The application Ref 8/22/1012/CLP, dated 24 November 2022, was refused by notice dated 10 March 2023.
 - The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended ('the Act').
 - The use for which a certificate of lawful use or development is sought is Proposed use as a solarium (tanning salon), use class E.
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Decision

1. The appeal is dismissed.

Procedural Matters

2. There was no description of development on the application form, this merely reads "Please refer to attached covering letter". That which I have given in my header is taken from that letter. It differs from that given by the Council on its decision notice, as well as that on the appeal form for that matter, neither of which refer to use class E. However, as there is no evidence before me that the applicant agreed to a change in description, I have used that from the covering letter.
3. Neither party was of the opinion that I needed to visit the site before making my decision. After reviewing the evidence, I, too, find that this is the case. Thus, I have made my decision without visiting the site.

Reasons

4. Section 192(1)(a) of the Act provides for the making of an application to ascertain whether any proposed use of land or buildings would be lawful. Where, as here, a local planning authority refuses to issue a certificate, s195(a) provides the statutory basis for an appeal to be made. The onus lies with the Appellant to make his case on the balance of probability.
5. The main issue is whether the Council's decision to refuse a certificate was well-founded.

6. Lawfulness is not defined in s192. However, reference can be made to the definition of lawfulness in s191(2) of the Act. That section relates to existing uses and development, rather than those proposed. However, one need only change the tense in s191(2) to define lawfulness in terms of s192. In essence, it defines that a use will be lawful if (a) no enforcement action might be taken in respect of it; and (b) it would not constitute a contravention of any of the requirements of any enforcement notice then in force.
7. The Council's Questionnaire confirms that there was no enforcement notice in force that has any relevance to the proposal at the time that the application was made. Thus, I have to assess whether enforcement action might be taken in respect of the proposed use.
8. Unit 7 is one of 9 units located in one of the large buildings on the Christchurch Trade Park. The building is relatively new and the unit was vacant at the date of the application. Its construction was allowed under the terms of planning permission 8/20/1116/FUL. This allowed for the 'Re-development to provide for a mix of uses within Class E¹, Class B 1, B2 and B8 uses together with drive thru facilities and A3 /A5 units (Also Class E / sui generis.)'. The permission was subject to 21 conditions of which, the parties agree, Condition 15 is of particular relevance to this appeal.
9. Condition 15 states "Notwithstanding the provisions of the Town and Country Planning (General Permitted Development) Order 2015 [sic] or any subsequent re-enactment thereof, the employment terrace block or building as shown on the approved plan shall only be used within Use Class E (E(g)(i, ii, iii), B2 and B8." It was attached for the following reason, "In order to protect employment land in accordance with policies KS5 and PC1 of the adopted Christchurch and East Dorset Local Plan (2014) and Government Guidance contained in the National Planning Policy Framework."
10. The Appellant has specified that the purpose of the tanning studio would be to provide a service to visiting members of the public, whether by appointment or 'walk-in', wishing to get an artificial tan. There would be no retail element to the use. He states that the proposed solarium lies within Use Class E, specifically Class E(c)(iii), of the UCO.
11. In support of his position, the Appellant submitted four decision notices relating to applications for certificates of lawfulness from different local planning authorities. Two of these, those from Test Valley Borough Council and Cannock Chase Council, state that they found the use to fall within Class E(c)(iii); whilst those from North Devon District Council and Hinckley and Bosworth Council found the use to fall within Class E.
12. For its part, the Council suggests that the nature of the use "stands evidently apart" from those in Class E and, therefore, it is a *sui generis* use. In any event, it claims, it had no need to conclude on that point, as neither it nor the Appellant state that the use falls within 'Class E (E(g)(i, ii, iii), or Classes B2 or B8' that are cited in condition 15.
13. Of the uses referred to in condition 15, it is clear that the proposed use does not fall within Use Classes B2 or B8, which the UCO defines as 'General industrial' and 'Use for storage or as a distribution centre', respectively.

¹ These use classes are contained in the Town and Country Planning (Use Classes) Order 1987 as amended ('UCO')

14. Class E of the UCO relates to 'Commercial, Business and Service' uses; Class E(g) is "for— (i) an office to carry out any operational or administrative functions, (ii) the research and development of products or processes, or (iii) any industrial process, being a use, which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit." On the basis of the information before me, I find that the solarium does not fall within Class E(g)(i) (ii) or (iii).
15. Class E(c)(iii), which the Appellant claims is the correct use class for the proposed use, reads as follows, a use "for the provision of the following kinds of services principally to visiting members of the public—(iii) any other services which it is appropriate to provide in a commercial, business or service locality" I find that the proposed use would fall within Class E(c)(iii).
16. It is established case law that a limitation in a planning permission has to be set out in a condition. The Appellant argues that condition 15 should be read as saying that the appeal site for shall only be used for Class E purposes. I am sure that the omission of Classes B2 and B8 is a simple oversight on the Appellant's part and that he acknowledges that these uses would be lawful too.
17. In respect of the part of the condition that reads "(E(g)(i, ii, iii))", his argument is that brackets are not to be used as a grammatical tool to specify matters. The Collins English Dictionary, he says, states that their use is for "enclose(ing) a word or words which can be left out and still leave a meaningful sentence", or that "Brackets are also used to show alternatives or options". I have not been given a copy of that source, so cannot be sure that it is a full quote.
18. However, in my experience, brackets are commonly used to enclose explanations or provide additional information to a sentence, often being used to clarify matters. This, to my mind, is what "(E(g)(i, ii, iii))" does. The reasonable and correct way of reading this part of the condition is that it restricts uses within Class E to those within E(g)(i), (ii) and (iii), rather than allowing all uses covered by Class E. If the latter was the case, the reference to "(g)(i, ii, iii)" would be entirely superfluous.
19. The Appellant also states that the failure to include a bracket after "...iii)" skews the reading of the condition in grammatical terms. I agree, there should have been a bracket there. However, a reasonable reading of the condition is that this was a typographical error that has no fundamental bearing on the meaning of the condition, nor the control that it exerts on the permission.
20. The condition limits the use to which the appeal site can be put. Other uses, including those within Class E, are precluded without an express grant of planning permission.
21. Thus, the use of the site as a solarium would not accord with the terms of condition 15 attached to planning permission 8/20/1116/FUL, and it falls outside the scope of the planning permission, in the manner described in the judgement in *Barton Park Estates Ltd v SSHCLG & Dartmoor NPA* [2021] EWHC 1200 (Admin); [2022] EWCA Civ 833. Were it to be used as proposed, the Council might take enforcement action against it. Therefore, it would not be a lawful use.

22. That Class E was introduced to “increase flexibility of the planning system to better meet commercial requirements and encourage economic growth” is immaterial to my assessment as to whether a certificate should be issued or not. This is to be decided on the basis of lawfulness alone and this revolves around whether condition 15 provides a limitation to the use of the unit. I have found that it does. It limits its use to Class E(g)(i), (ii) and (iii), and Classes B2 and B8. Where, as here, a use does not accord with this limitation, the unit cannot lawfully be used for this purpose.

Conclusion

23. For the reasons given above I conclude that the Council’s refusal to grant a certificate of lawful use or development in respect of Proposed use as a solarium (tanning salon), use class E 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.

Roy Curnow

Inspector