



Appeal Decision

Hearing Held on 14 June 2023

Site visit made on 15 June 2023

by Roy Curnow MA BSc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 25th January 2024

Appeal Ref: APP/U5360/X/22/3309275

Brunswick and Columbia Wharf, 53-55 Laburnum Street, Hackney E2 8BD

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended ('the Act') by the Planning and Compensation Act 1991 against a failure to give notice within the prescribed period of a decision on an application for a certificate of lawful use or development (LDC).
 - The appeal is made by Mr Russell Grey of Shiva Ltd against the Council of the London Borough of Hackney.
 - The application (Ref. 2022/1902) is dated 2 August 2022.
 - 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 E(g)/F1(b).
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Decision

1. The appeal is dismissed.

Application for costs

2. At the Hearing an application for costs was made by Mr Russell Grey of Shiva Ltd against the Council of the London Borough of Hackney. This application is the subject of a separate Decision.

Main Issue

3. Given the failure of the Council to issue a decision on the application, the main issue is whether a certificate of lawful use should be issued.

Procedural Matters

4. There was some confusion as to whether the application to which the appeal relates was made under the terms of s191 or s192 of the Act, that is to say whether it was an application for a certificate of lawful existing use or lawful proposed use. The application was made on forms relating to the latter, whilst the accompanying submissions pointed to the former. I wrote to parties prior to the appeal setting out that I found it to be the former. The parties agreed this to be the case in the Hearing, so I am determining this as an appeal related to a certificate of lawful existing use.
5. I was presented with a number of documents at, or very shortly before, the Hearing. Following discussions with the parties, in respect of their relevance and reasons for their late submission, I accepted those that are listed at the end of this decision letter. However, following a similar discussion regarding a heritage statement provided by the Appellant, he withdrew the document from

his submissions. I was given a Statement of Common Ground. This was signed by both parties and is largely a recitation of the site's history. I have taken those documents that I accepted into account in making my decision.

6. Mr O'Connor, of the Council, joined the Hearing via a video link.
7. I closed the Hearing on 14 June. There was no discussion of the merits of the parties' cases at the site visit, that was held on 15 June.

Reasons

8. S191(1)(a) of the Act provides that if any person wishes to ascertain whether any existing use of buildings or other land is lawful they may make an application for the purpose to the local planning authority, specifying the land and describing the use. Under s191(2), uses and operations will be held to be lawful at any time if: no enforcement action may then be taken in respect of them; and they do not constitute a contravention of any of the requirements of an enforcement notice then in force.
9. S171B sets out the time limits after which developments can be considered to be lawful. In this case, where a certificate is sought for a mixed use of the property, the relevant time period of ten years ('the relevant period') is set out in s171B(3). S195(1)(b) states that an appeal may be made to the SoS where a Council fails to determine an application for a certificate of lawfulness within the prescribed time period.
10. Settled case law sets out that it is for an Appellant to demonstrate that the use that it is claimed has been continuously carried out for the relevant period prior to the date that his application was made, and that this was not lost thereafter. The onus lies with the Appellant to make his case on the balance of probability.
11. The site comprises a collection of buildings that lies immediately to the south of the Regent's Canal. It is bounded on its other sides by Haggerston Road to its west, Laburnum Street to its south, and residential development to its east.
12. The buildings at the eastern end of the site are older and generally of more architectural and historic interest. At the western end is a building with a collection of flat-roofed elements of a utilitarian design that date from the 1950s to 1960s. The whole site lies within the Regent's Canal Conservation Area, and parts of it are in the settings of Haggerston Baths and Haggerston Bridge, both of which are listed. However, as this is an appeal relating to a certificate of lawful use, these have no relevance to my decision.
13. Amongst the Appellant's submissions was a 'Site Zoning Map', on which the buildings were divided into 6 parts together with a yard area. These zones were defined merely to assist me during the Hearing to locate those parts of the site where uses occurred. Where appropriate, I refer to the 'zones' identified on the map in my decision.
14. When I visited the site, I found that it was being used in the following manner. Entrance to the southeast and northeast zones was via a yard area that gave onto Laburnum Street. These zones were used as studios across both floors. The south central area, which could also be accessed from the yard, contained a number of smaller studios, including a recording studio, and ancillary facilities such as toilets. Internal links from here led to multi-use spaces in the north central and northwest zones. There was a large door in the west elevation of

- the latter zone that gave access to Haggerston Road. The three northern zones gave access to the south bank of the canal.
15. The ground floor of the southwest zone housed studios. A pedestrian door in this zone, from Laburnum Street, gave access to a lobby. This gave access to the site's ground floor commercial uses and to a stairwell. This led to two first-floor flats. These flats had external amenity areas on the flat roof of the southwest zone. These amenity areas were only loosely divided from the flat roofs above the northwest and south central zones.
 16. Amongst other things, the flat roof above the south central zone had chairs, tables and barbecue facilities. That above the northwest zone had tables and chairs on it and several art installations, including three fibreglass sharks. I was told that their occupants were also allowed to use these areas for amenity purposes, and did so. The flat roof above the northeast zone was unused, save for the siting of several beehives.
 17. A door from the stairwell also provided access to the flat roofs for the occupiers and users of the ground floor without the need to go through the flats. There was also a first-floor door onto the roof from the southeast zone, but this appeared not to have been used for some time.
 18. The stairwell continued upwards to reach the flat roof above the first-floor flats. Here, I saw a single storey building known as the Beach House. This had the facilities to allow for day-to-day living, but was not in use when I visited. The evidence before me shows that the Beach House and fencing around part of the flat roof that has been formed by railway sleepers are the subject of an enforcement notice. The Notice, requiring their removal, was upheld at appeal.
 19. When determining an appeal that relates to the change of use of land, it is necessary to identify the planning unit. Settled case law¹ sets out three categories of planning unit: a single planning unit where the unit of occupation has one primary use and any other activities are incidental or ancillary; a single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another; and the unit of occupation comprises two or more physically separate areas which are occupied for different and unrelated purposes. Each area that has a different primary use ought to be considered as a separate planning unit.
 20. The plan accompanying the application identified the planning unit as the buildings and yard. In the Hearing, the Appellant initially argued against the inclusion of the two first floor flats. In addition, he objected to the inclusion of an area of canal to the north of the buildings on the site.
 21. Both were identified as being within the planning unit by the Inspector that determined the appeals² made by the same Appellant against enforcement notices ('the enforcement notice Inquiry') alleging unauthorised operational development ('op dev') and an unauthorised material change of use of the land ('mcu').
 22. The Council was of the view that they should be included. No substantive argument was made by the Appellant as to why the planning unit should be different from that agreed in the Inquiry, and he agreed that there had been no

¹ *Burdle & Williams v SSE & New Forest DC* [1972] 1 WLR 1207

² Op dev – PINS Ref APP/U5360/C/19/3242430; and mcu – PINS Ref APP/U5360/C/20/3260019

- significant change in circumstances since that decision was issued. His final position was to leave a decision on the matter to my discretion.
23. That this was a matter on which the Inspector made his finding after a multi-day Inquiry where there was clearly a detailed debate, carries great weight in my finding on this matter. Given the lack of reasoning to find to the contrary, that there have been no substantive changes since that decision, and from the evidence of my site visit, I find no reason to identify a planning unit different to that of the enforcement notice Inquiry Inspector. What is before me is a single planning unit that is in a mixed use because the land is put to two or more activities and it is not possible to say that one is incidental to another, as identified in *Burdle*.
 24. The site has a long history. That it was in an industrial use before the first entry in the Council's 'Planning History' is accepted. The Council's Planning History for the site begins in 1998, but this was shown to be incomplete. The 'Planning Archive' document that the Appellant supplied contained documents relating to an application from 1997 (Council reference 11/S/567/97/FP).
 25. Of particular importance to the case before me are the decisions reached by the Inspector in the enforcement notice Inquiry. The op dev notice was issued by the Council in 2019 and that alleging a mcu was issued by it in 2020. The Inquiry was held in 2021, with the decision letter dated 10 January 2022.
 26. The Appellant's position set out in the Hearing is that the lawful use of the land is as a mix of artists' studios and for the display of art installations. In the debate that followed this assertion, the Council said, were I to find this to be the case, that the reference to art installations should be followed by the words "other than for the purposes of sale or hire". The Appellant, whilst saying that he had certain reservations in this respect as this had happened at times in certain locations, nonetheless accepted this.
 27. There is no doubt that the land has been used for the display of art for a considerable period. Substantial evidence was submitted to illustrate its use as a gallery in what were termed 'Certificate of Lawful Use evidence Pt 1' and 'Certificate of Lawful Use evidence Pt 2'. These show that a number of exhibitions were held there from 2002 to 2020. The Council described this use, as "intermittent". In its view, it did not equate to a continuous use, as required by settled case law.
 28. For some of the gaps identified by the Council, I found the argument put forward by the Appellant that they represented the taking down of one exhibition followed by the preparation for, and setting up of another, to be convincing. However, as some of these breaks lasted for several months, including one of over 6 months, I find that these did break the continuous nature of the gallery use.
 29. The Council claimed that in a number of application forms for planning permissions at the site made between 2006 and 2016 the existing use of the site made no reference to gallery usage. Whilst the Appellant did not comment on this, as the Council did not provide copies of those documents I do not have sufficient evidence on which to draw any conclusion on this matter.
 30. The Council asserts that when the use of the first floor of the property for residential purposes commenced, so began a new chapter in the use of the

- property as a whole. I find that this was most likely the case at the time of the enforcement notice Inquiry, as the parties agreed that by then the flats had become lawful.
31. The flats were included amongst the elements of the mixed use alleged in the enforcement notice, as corrected by the Inspector. The Appellant made cases under Grounds (b) and (c) in the mcu appeal, which is to say that the alleged mcu had not occurred and, if it had, it did not constitute a breach of planning control. The Inspector concluded otherwise on both matters.
 32. The Appellant also made a Ground (a) appeal. That is to say, he sought planning permission for the mixed use that had been identified as occurring. The Inspector granted planning permission for that mixed use subject to a number of conditions. As the Inspector found that the mixed use for which he granted planning permission had occurred, he was approving this retrospectively. That is to say, that the use was extant at the time he allowed the appeal and so the development for which he granted permission had commenced and with it a new chapter in the planning history of the land. This was sufficient to terminate any earlier lawful use of the land, in line with the decision in *R (Ocado) v Islington LBC* [2021] EWHC 1509 (Admin). Therefore, the mixed use identified by the enforcement Inspector is the lawful use of the land.
 33. I do not agree with the Appellant that the Inspector in the enforcement notice Inquiry “foisted” the mixed use on him; nor is there evidence before me to demonstrate that this was an “artificial construction of the lawful uses”, as the Appellant claimed in the Hearing. The Inspector found that the mixed use had occurred after considering evidence given under Oath at the multi-day Inquiry. He found that it required planning permission, which was actually sought by the Appellant in his Ground (a) case. Rights arising from pre-existing uses were lost at the time of that decision, as set out in *Newbury DC v SSE & Others* [1980] 2 WLR 379, [1981] AC 578.
 34. Of the conditions that were attached to the planning permission, condition 5 required the submission of details relating to a soundproofing scheme for the two flats. If the timetable set out in the condition were not to be adhered to, the use would have to cease until an approved scheme were implemented. The condition has not been complied with.
 35. In its written submissions, and in the Hearing, the Council put forward the argument that non-compliance with the condition meant that the land had a ‘nil use’. If this was not held to be the case, it said, then the lawful existing use of the land was for the mixed use allowed in the enforcement notice Inquiry decision. My finding on this is that the permission remains extant, and the lawful use of the land is the mixed use that it allowed. What has occurred is a breach of the condition, rather than the planning permission falling away.
 36. The use of the whole of the land as Artists’ studios and the display of art installations other than for the purposes of sale or hire is clearly different from mixed use allowed at appeal. They are, however, component parts of the mixed use allowed at appeal. It was not demonstrated how the use of the land for those two elements alone would not be materially different from the lawful use of the land. From the evidence that was put before me, I find that it would be.

37. Although the Appellant has argued that those other elements had not occurred, that is not what the Inspector found in the enforcement notice Inquiry. I did not see the building being used for restaurant/bar, cinema and social gatherings purposes at my site visit. However, I was provided with no persuasive evidence that those uses had been abandoned in the manner set out in established case law. Whilst they might not have taken place since the appeal, as stated by Harley Gray in his written evidence, I take them to be dormant uses that might be re-started in due course.
38. The Appellant says that the appeal before me is about matters that the Inspector did not consider in the Inquiry. He made his application in the light of the Inspector's comment in paragraph 120 of his decision, that it was open to the Appellant to do so as it was not a matter that the Inspector could address at that time. I understand that it was open to the Appellant to make the application, but the Inspector was not saying that the uses would be lawful. It is still for the Appellant to make his case in this regard, on the balance of probability. He has failed to demonstrate that the mixed use of the land he posits is lawful.
39. The use that the Appellant seeks a certificate for would not lead to a contravention of any enforcement notice in force. However, given the materiality of the change, the Council would be able to take enforcement action against the use which would not have gained immunity through the passage of time.

Conclusion

40. For the reasons given above I conclude 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

APPEARANCES

FOR THE APPELLANT

Russell Gray	Principal Director, Shiva Ltd
Ravi Baskharan	Shiva Ltd
Alex Brown	Shiva Ltd

FOR THE COUNCIL OF THE LB HACKNEY

Gerard Livett
Patrick O'Connor (via video link)
Thomas Russell

DOCUMENTS

1. Statement of Common Ground
2. 'Appellant's Submissions'
3. 'Hackney Planning Archive' – planning application 11/S/567/97/P
4. *Newbury DC v SSE & Others* [1980] 2 WLR 379, [1981] AC 578
5. *R (Ocado) v Islington LBC* [2021] EWHC 1509 (Admin)
6. Planning History of the site submitted by the Council
7. 'Evidence of Harley Gray'