



Appeal Decisions

Inquiry held on 25-27 June and 1 July 2024

Site visit made on 25 June 2024

by M Bale BA (Hons) MA MRTPI

an Inspector appointed by the Secretary of State

Decision date: 15 July 2024

Appeal A Ref: APP/V5570/X/22/3303101

Appeal B Ref: APP/V5570/X/23/3319445

Units A-D Bush Industrial Estate, Station Road, Islington, London N19 5UN

- The appeals are made under section 195 of the Town and Country Planning Act 1990 as amended against refusals to grant certificates of lawful use or development.
 - The appeals are made by Ocado Retail Ltd against the decisions of the Council of the London Borough of Islington.
 - Appeal A, relating to application ref P2021/2664/COL, dated 10 September 2021, was refused by notice dated 21 February 2022.
 - Appeal B, relating to application ref P2022/2778/COL, dated 14 July 2022, was refused by notice dated 23 February 2023.
 - The applications were 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 in both cases is stated on the application forms as use class B8.
-

Decisions

1. Appeals A and B are dismissed.

Preliminary and background matters

2. Appeal A relates to a building known as units A-D and wider land about that building. Appeal B relates solely to the building itself and does not include any wider land.
3. Planning permission was given in 1984 for the erection of units A-D as a building to house British Telecom (BT) Regional Power Workshops and ancillary buildings for storage, diesel repair and engine testing, with associated vehicle parking (the 1984 Permission).
4. It is common ground between the parties that the building containing units A-D was erected pursuant to that permission, but probably was not used. That is because a further permission, more aligned to BTs changing requirements of the time, was granted in respect of it in 1988 for alterations to existing buildings to provide London Payphone Services Centre and two-storey diesel workshop (the 1988 Permission).
5. Until relatively recently, there was a further building close to units A-D, known as Unit E. At the Inquiry, the parties were in agreement that this was probably the building referred to in the 1988 Permission as the two-storey diesel workshop. The parties believe that the 1988 Permission was implemented and the site came into use as the Payphone Services Centre. However, it is the case of the appellant that the actual use of units A-D since 1992 has been within

Part B, Class B8 of Schedule 1 to the Town and Country Planning (Use Classes) Order 1987 as amended (the UCO).

6. Subject to an additional proviso that is not relevant in this case, Section 191(2)(a) of the Town and Country Planning Act 1990 as amended (the 1990 Act) sets out that a use is lawful at any time if no enforcement action may be taken in respect of it (whether because it did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason). Section 171B(3) of the 1990 Act provides that no enforcement action may be taken after the end of the period of ten years beginning with the date of a breach of planning control that is not consisting of the carrying out of operations or the change of use of any building to a dwellinghouse.
7. As the 1988 Permission is understood to have been implemented, it is common ground that the correct approach for the appeal would be to determine whether it has been established that a material change of use from that authorised by the 1988 permission occurred and persisted for the requisite period. I have no reason to disagree.
8. The burden of proof is on the appellant and the standard of proof required is the balance of probabilities. If the evidence is sufficiently clear and precise and there is no evidence to contradict the appellant's version of events or make it less than probable, then their evidence should be accepted and a certificate of lawful use or development should be issued.
9. At the site visit, I observed signage that appears to refer to the building known as Connection House as unit 13 Bush Industrial Estate. However, at the Inquiry, the parties agreed that any reference to unit 13 was actually to one of the other units directly accessed from Station Road and as so labelled on various plans in the evidence. For the avoidance of doubt, that is also the approach that I have taken to referencing buildings in this decision.

Reasons

10. When deciding whether a use is lawful, it is first necessary to identify the correct planning unit before analysing what use that unit has been put to. If a lawful use of the planning unit has been established, it is then necessary to consider whether there has been any supervening event, such as may cause any lawful use rights to have been subsequently lost.

The planning unit

11. The Bush Industrial Estate occupies an area of land between a mainly residential area and a railway line. A range of buildings, known as units 1-13 are accessed directly from Station Road. Since the 1980s BT occupied units 1-3 and 7-13 to varying degrees but, subsequently, gradually ceased to do so.
12. Between units 1-13 and the railway line, and stretching further beyond those units and the end of Station Road, is a wedge-shaped area of land that was initially within the freehold ownership of BT (the Freehold Land). The appeal sites, including units A-D, and the site of the former unit E are within and at the end of that land furthest from Station Road. Approximately centrally on it, is a further building known as Connection House.

13. Detailed documentary evidence about how BT used the industrial estate is limited. Instead, most evidence about the historic use has been provided by statutory declarations, and the written and verbal evidence given by Mr Molony, on affirmation, to the Inquiry. There is nothing substantive to refute his evidence about BT's use of the overall Bush Industrial Estate.
14. In the 1980s, units 1-3 and 7-10 had planning permission for use as a Telecommunications Service Centre. Units 11-13 were used as a Motor Transport Workshop. Against that background. BT sought permissions to develop the Freehold Land, first obtaining the 1984 Permission, then permission for vehicle parking behind units 3-10, Connection House and the 1988 Permission.
15. Thus, the planning permissions for the Freehold Land were independent to the remainder of Bush Industrial Estate. While the planning officer's report for the 1984 Permission noted that a large canteen would be available to all BT's staff on the industrial estate, the then proposed Regional Power Workshops were, primarily, to be a use relocated from elsewhere in London, functionally distinct from those already at the Bush Industrial Estate. There is no reason that the functional separation would have changed as a consequence of the move.
16. There is little remaining evidence relating to the 1988 Permission, but there is no dispute that, after it was granted, BT undertook coin counting in units A-B, with payphone stores in units C-D. While workers on the wider industrial estate may have been able to access units A-D, on the available evidence this also appears to have been a functionally separate use to those that were going on in units 1-3 and 7-13. There is no evidence either way as to whether the canteen first intended in 1984 actually provided facilities for the workers on the wider industrial estate or not.
17. On this basis, although BT occupied both the Freehold Land as well as units 1-3 and 7-13, and they were physically adjoining, I find as a matter of fact and degree that the Freehold Land, including the appeal sites, was not part of the same planning unit as the remainder of the Bush Industrial Estate when first used by BT.
18. The formation of a vehicle park and cable compounds on land to the rear of units 1-10, and Connection House had their own specific planning permissions for different, identifiable uses. The plans I have been provided with identify the application site for Connection House as being just a small part of the Freehold Land around the building and separated from the present appeal sites by a newly created hammer head turning area from the end of Station Road alongside units 11-13.
19. Thus, there were separate planning permissions, for different purposes governing units A-E, and all other parts of the Bush Industrial Estate, including the remainder of the Freehold Land. On this basis I find that units A-E were not originally in the same planning unit as the remainder of the BT occupied land at the Bush Industrial Estate.
20. As described in the 1988 Permission, unit E was to be a two-storey diesel workshop. It is not clear from the very limited surviving documents whether this was intended to be part and parcel of, or in addition to the Payphone Services Centre in units A-D. Its early use is unknown, however, there was already a vehicle workshop in units 11-13 and Mr Molony only ever saw unit E

being used for stores. For this reason, and as it was permitted by the same permission as units A-D, I find it more likely than not to have been used alongside those units as part of the same planning unit.

21. BT clearly viewed all of their occupation of the Bush Industrial Estate as a single asset and could move their operations between various parts of it. However, that is not to say that those different parts did not perform separate identifiable uses, operating under the control of different planning permissions. As BT reduced its occupation of units 1-3 and 7-13, that would have had no effect on the identifiably separate uses that the different parts of the Freehold Land were being put to.
22. I, therefore, find no reason that the planning units would have changed during BT's occupation and that the unit relevant to these appeals is that which contained units A-E and the land around them, up to the access to them from Station Road alongside units 11-13. That area is consistent with the site identified in Appeal A.

The use of the planning unit

23. After it had first been permitted as the London Payphone Services Centre, a number of activities went on in units A-D, in particular, the coin counting operation. By the time Mr Molony first visited the site in 1992, that had ceased, and the ground floor area was being used for storage of items required by off-site engineers. As BT consolidated its estate across London, more and more storage uses were brought to the appeal sites, to the extent that the vast majority of the buildings were used in that way. This may well have been to such an extent that the planning unit was taken out of its permitted use.
24. The canteen area, if it had served food for workers, did not do so for longer than a couple of years after Mr Molony's first visit at the latest, and after which no staff were employed in connection with it. It had, in essence become a 'self-messing' area for staff relaxation. It is likely that this space, along with other welfare facilities including a drying room, was most used by field engineers returning from off-site jobs. As those remote workers would likely only visit the site in connection with the stores, their use of those welfare facilities during their visit would be part and parcel of that storage use. On the evidence, it seems that the basic way that the majority of units A-D were used was fairly consistent throughout the period from 1992 until BT vacated it, albeit that the teams using would have changed from time to time.
25. A feasibility study for the rationalisation of BT's use of units A-D in 2006, with the potential for leasing half of it to others included an indication of possible space requirements. A number of functions that were described in that report would not appear to be associated with storage uses. However, while the report explored how BT could have put the building to use, there is no particular evidence that those uses were going on within units A-D at the time. Seen through a lens of constant reorganisation of BT's space across its London portfolio at the time, this does not conflict with Mr Molony's account of how the building was actually used after 1992.
26. However, there is no particular evidence, and Mr Molony could not elaborate, as to how the offices were used. In a previous Statutory Declaration of 9 December 2021, he said that the building included offices for managers of field staff and team meeting rooms. The description given by him to the Inquiry, is

that they were only lightly used, 'ancillary' to the primary use for storage. By the time of a 2007 space audit, there is reference to the spaces being used by a number of different off-site teams and field engineers. At the Inquiry, Mr Molony was unable to say how or from where the off-site teams were managed, or what use the offices were put to.

27. In cross examination, Mr Molony maintained that given BT's preference not to locate office-based jobs at what he called 'depot' sites, those office-based workers would not have been at the site had the teams they were associated with not been storing items there. The appellant contends that this would be no different to a situation where a site was used as any sort of distribution centre, where off-site teams would be based, routes, deliveries and the like would be assembled and coordinated. Drivers would visit the site to collect their loads, use the welfare facilities and then leave. However, the evidence does not show that this was the situation that was actually going on at the site during BT's occupation.
28. Instead, the use of the units was not to house goods that the off-site teams would take away to distribute to places. Rather those workers, that could be working at a site elsewhere would come to the site to collect things that were required for their jobs. On this basis, I find it more likely than not that those based in the offices would most likely be managing those off-site works, rather than coordinating distribution of the things stored on the site. If the off-site workers also returned to the office areas to report the completion of their job, that would not necessarily have been with the associated purpose of storing things there. This is subtly, but importantly different to the comparable scenario that the appellant paints.
29. It may well be that the offices were conveniently located alongside the stores and would not have been there were it not for the availability of storage. But that is not an indication that they were somehow part and parcel of the storage use. Although there is no particular evidence of the building's use to counter the appellant's claim that the use was primarily storage, the evidence presented to me does not substantiate Mr Molony's consistent but basic claim that the office uses were ancillary, as he put it, to the storage use.
30. While cross-examination showed Mr Molony's evidence to be reliable, he was not based at the site himself and, as he clarified at the Inquiry, can only say what he saw when walking through. What he saw was a light or occasional office use. Thus, the offices may not have been used to their full potential, but that is not to say that the way they were used was ancillary or part and parcel of the storage use.
31. That BT had built Connection House as a more general office building is something of an irrelevance given that they vacated the building the mid 1990s. That is not to say that units A-D subsumed the activities of Connection House at that time, but that its construction and subsequent use does not assist one way or the other in illuminating what was going on within units A-D.
32. Where there is no contrary evidence, the appellant's version of events should be accepted, where it is sufficiently precise and unambiguous. A generalised, but unspecific claim of ancillary use is not precise and without any clear account of what was actually going on in the offices, is ambiguous.

33. In respect of unit E, Mr Molony only ever saw an internal use for storage of miscellaneous items. He explained how the outside yard area around it was used for the storage of mobile generators and that he was never aware of any maintenance activities going on in it. He described the majority of the building as two-storey, and unsuitable to accommodate vehicles, save for a small canopy area and full height loading bay that vehicles could back into.
34. Despite the report title and overall description of the building in a 2005 asbestos survey as a diesel repair workshop with offices, photographs and plans within the report show the building being used for storage. Mr Molony explained that those photographs were representative of the use of the building throughout his knowledge of it.
35. The evidence otherwise indicates that the yard area around unit E was used for storing mobile generators and that any uses of unit E were ancillary to that. The only real case for that having not been the situation is the building's description as a former vehicle maintenance unit, but not only are those words specifically referring to the past, the only available evidence is that that was not the use that the building was put to from 1992 onwards.
36. From the evidence I have, I find that mobile generators were brought to the site and kept there while not in use for off-site activities. It is common ground that such is an activity falling within Class B8 within the UCO. While they were there, the generators would have been charged, tyre pressures and the like may have been checked, but given the large vehicle maintenance workshop nearby in units 11-13, the primary purpose that they would have been on the unit E site would more likely than not have been storage.
37. When considering unit E and the land around it, I have no reason to find it important that the primary activity and purpose BT put it to was outside the building. That is the way that the land was used and, even if the uses within unit E were not ancillary to that external storage, it was still a storage use of the building and the use of the land around it.
38. Looking at the planning unit as a whole, then, permission had been granted for the use of the site as a Payphone Services Centre. The original coin counting use ceased, and after that the use of the site morphed into other things. The buildings and associated yards lent themselves to storage and were a convenient location where other storage uses could be brought onto the site. It was an obvious target location for BT to consolidate such activity from other sites across London.
39. But in the absence of any detailed evidence as to what else was going on there, particularly in the office areas, I cannot say that it was more likely than not that storage, or any other use within Class B8 of the UCO, was the sole primary use. When weighing evidence on the balance of probabilities, it may well be there are frequently doubts. Given the length of time involved, gaps in knowledge are probably to be expected. In that scenario, the appellant's version of events should generally be accepted where there is no evidence to the contrary. However, the onus of proof is on the appellant and, therefore, even without contrary evidence, that evidence must be sufficiently precise and unambiguous.
40. While I understand that the appellant has gone to great lengths to try to fill gaps in the narrative, there is still a very poor understanding as to what went

on in the office parts of the building. It is known that they were used, albeit lightly, and it is imprecise to say, vaguely, that they were used 'ancillary' to the storage use, without describing that use in more detail.

41. The fact that the level of activity was low is not, of itself, indicative that the office uses were somehow 'ancillary' or part and parcel of the storage use. Indeed, for the reasons I have given, I find it more likely than not that they were separate to it. Such would have resulted in more than one primary use and a mixed use of the planning unit for the duration of BT's occupation from 1992 until it left the site. If the site were put to storage or distribution uses since BT's vacation, that period, by itself, was insufficient to establish a lawful use.
42. It has not, therefore, been demonstrated on the balance of probabilities that a use falling fully within class B8 occurred for more than 10 years in any period before the applications were made and a certificate in the terms sought cannot be granted. Moreover, as I do not know enough about the other use(s), I have insufficient evidence to certify, on the balance of probabilities, that any other use went on at the site for more than 10 years.

Conclusion

43. For the reasons given above I conclude that the Council's refusal to grant certificates of lawful use or development in respect of the use as use class B8 was well-founded in both cases and that the appeals should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act.

M Bale

INSPECTOR

Appearances

FOR THE APPELLANT:

Paul Brown KC, instructed by Anita Rivera (Mishcon de Reya LLP)

He called:

Damian Molony MRICS
Danny Kennedy MRICS

FOR THE LOCAL PLANNING AUTHORITY:

David Forsdick KC, instructed by the Borough Solicitor, rep. Laura Avery (Council of the London Borough of Islington)

FOR THE CONCERNED RESIDENTS OF TUFNELL PARK (Rule 6 Party):

Richard Wald KC, instructed by Alec Cropper (Walton & Co)

INTERESTED PARTIES:

Mark Hudson

Documents submitted at the Inquiry

- ID1 Appearances for Ocado Retail Ltd
- ID2 Opening statement for Ocado Retail Ltd
- ID3 Opening comments on behalf of the Council
- ID4 Opening submissions on behalf of Concerned Residents of Tufnell Park
- ID5 Timeline of Further Uses/Permissions
- ID6 Closing speech on behalf of the Council
- ID7 Closing submissions on behalf of Concerned Residents of Tufnell Park
- ID8 Closing statement for Ocado Retail Ltd