



Appeal Decision

Hearing held on 13 August 2024

Site visit made on 13 August 2024

by James Blackwell LLB (Hons) PGDip, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 20th August 2024

Appeal Ref: APP/G2625/X/23/3332284 93-103 Barker Street, Norwich NR2 4TQ

- 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 P Phillips and Son (Reading) Limited against the decision of Norwich City Council.
 - The application ref 23/00036/CLE, dated 9 January 2023, was refused by notice dated 28 July 2023.
 - 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 use within Class E(a).
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Decision

1. The appeal is dismissed.

Background

2. The appellant is the freehold owner of the appeal premises. The premises are occupied by Building Supplies Distribution Limited (BSDL), a company which specialises in the sale of building materials. BSDL has occupied the premises since 2008, pursuant to a lease with a term of 25 years.
3. Planning permission relating to the appeal premises was granted by the Council in 2007 (reference 07/00189/F) for the "*partial demolition of existing building and alterations to form Builders Merchants and external storage yard*" (Planning Permission). Notwithstanding the reference to "*Builders Merchants*", the Planning Permission does not specify the authorised use class of the premises.
4. The Council and BSDL both say that the primary use of the builders' merchant is either a B8 use (storage and distribution) or a sui generis use. Conversely, the appellant says the primary use of the premises falls within Class E(a), which was incorporated into the Use Classes Order 1987 (as amended) by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. Class E(a) covers "*use for the display or retail of sale of goods, other than hot food, principally to visiting members of the public*". This forms the basis of the dispute between the parties.
5. As an application for a lawful development certificate, the burden is on the appellant to demonstrate their case, on the balance of probability. Planning merits are not relevant.

Main Issue

6. In this context, the main issue is whether, on the balance of probability, use of the appeal premises falls within Class E(a) of the Use Classes Order 1987 (as amended).

Reasons

Use by BSDL

7. The builders' merchant which is operated by BSDL within the appeal site comprises several different components: upon entry into the site, there is a large external yard, which accommodates bulky building materials such as bricks, concrete blocks, roofing materials and lintels; there is an area dedicated to landscaping products; and there are also approximately 15 customer car parking spaces, HGV loading areas as well as additional spaces for staff parking.
8. Internally, there is an extensive warehouse separated into different sections, with a series of large access points. The warehouse accommodates other bulky building materials, including those which need to be kept dry. Adjacent to the warehouse, there is a trade counter together with office function, as well as a self-select area from which smaller products can be purchased, such as paint, ironmongery and other fixtures and fittings. There is also a kitchen and bathroom showroom and a tools/machinery hire store.
9. Whilst anyone is able to access and purchase products from the site, much of its physical character and overarching use appears to be geared towards the trade or construction industry. Indeed, many of the larger goods and materials, which are stored in bulk, would need a van or larger vehicle to be transported off site. Attesting to this, HGV and other safety signage is evident throughout. Many of the products are also specialist in nature, and cater directly to those with specialist training. Moreover, with the exception of the self-select area, no prices are shown next to any products. This reflects the variable pricing model of BSDL, which is understood to be typical of the trade and construction industry.
10. Reflecting this assessment, BSDL's accounts demonstrate that 87% of its turnover is made via trade accounts held by trade or business customers. The remaining 13% of turnover is attributed to cash purchases, of which half are also made by trade customers. This means approximately 93-94% of all sales are made to trade or business customers.

Scope of Class E(a)

11. Class E(a) refers to use for the "*display or retail of sale of goods*". The Cambridge Dictionary defines 'retail sales' as "*sales of goods to the public rather than to business*". The Oxford Dictionary defines 'retailing' as "*the sales activities involved in selling goods or services directly to final consumers for their personal, non-business use*". This suggests Class E(a) is not intended to include the sale of goods to people in a trade capacity, where goods are not bought for personal use. The fact that the overwhelming majority of sales are made to trade customers is therefore indicative of BSDL's use falling outside of Class E(a).

12. Class E(a) also requires the display or retail sale of goods to be "*principally to visiting members of the public*". In this instance, at least half of the sales made to customers with a trade account (which accounts for 87% of BSDL's total sales) are made by pre-order, and are delivered directly by BSDL without the customer visiting the site. Plainly, such sales are not made to "*visiting members of the public*". Those trade sales where the customer does visit the site to collect goods would also not fall within the scope of Class E(a), as they would not be "*retail sales*" to visiting members of the public. At most, this means only those cash sales which are made to non-trade customers who visit the site would fall squarely within Class E(a). These amount to just 6-7% of all BSDL sales, and therefore represent a very minor part of the site's overall use.
13. Moreover, it is reasonable to interpret "*visiting members of the public*" as traditional consumers, and not business or trade customers. If the wording was intended to capture everyone, including tradespeople, it would serve no purpose at all: the use class could simply refer to "*use for the display or retail sale of goods, other than hot food*". It therefore seems logical to conclude the use class intended to distinguish between trade customers and non-trade customers, a position which is consistent with the reference to "*retail sales*" elsewhere in its description.
14. Therefore, whilst products are undoubtedly "displayed" throughout much of the appeal premises, they are not displayed "*principally to visiting members of the public*". This is because the vast majority of BSDL's customer base are tradespeople or businesses. The display of goods alone is not sufficient to bring the use within Class E(a).

Planning Impact

15. It makes sense that the legislation would distinguish between uses relating to trade customers and non-trade customers (or consumers), as the planning impact of the two can be very different. For example, BSDL's opening hours cater directly to the needs of the construction industry, by opening early and closing during evenings, Saturday afternoons, Sundays and bank holidays. Conversely, retail stores such as B&Q and Wickes, which cater more towards DIY consumers whose shopping patterns are typically different, are open later in the day and throughout weekends and most bank holidays.
16. The types of vehicles used by tradespeople will often differ to those used by traditional consumers, with tradespeople more commonly using vans, lorries or HGVs. This means the highway safety impact of uses associated with trade customers can be very different to general consumers. In this instance, the signage and the layout of the site, both of which cater to large vehicles, attests to this.
17. Visits by tradespeople are also often limited to the quick collection of materials, whereas visits by non-trade customers, who may spend longer browsing products, will often be longer. Consequently, the level of parking necessitated by trade customers is generally much lower than parking provision necessitated by non-trade customers.
18. To help illustrate this point, the Council said that 85 additional customer parking spaces would be needed to meet the Council's current policy standards if the appeal premises were to be assessed as a retail use within Class E(a). Yet, the 15 customer parking spaces within the appeal site are understood to

meet demand sufficiently, without causing congestion or overspill parking. In terms of impact, this demonstrates the significant difference between BSDL's use and use by retail stores such as B&Q and Wickes, where the parking demand is much greater.

Conclusion

19. Bringing these factors together, the builders' merchant operated by BSDL within the appeal site primarily caters towards tradespeople and businesses in the building and construction industry. This is reflected not only in the physical character and layout of the site, but also in the proportion of turnover which is attributed to trade sales, and the way those sales are made.
20. Therefore, on the balance of probability, the primary use of the site does not fall within Class E(a). This is because the display or sale of goods is not primarily retail focused, nor is the display or sale of goods principally to visiting members of the public. Whilst some retail sales are certainly made to visiting members of the public, this accounts for a very small, ancillary element of the site's overall use.

Other Matters

21. The Planning Permission and the lease are both consistent with this conclusion. Indeed, the planning statement associated with the Planning Permission says the majority of BSDL's business falls within a B8 use class, as it primarily comprises the bulk storage and distribution of goods to trade customers. The committee report suggests the application was approved on this basis. The user clause in the lease also says the premises shall not be used otherwise than for a builders' merchants or other use within use class B8, without landlord consent. These documents are therefore both consistent with use of the premises falling outside of Class E(a), and in neither is any retail use mentioned.
22. The Land Use Gazetteer says that a builders' merchant may fall within a number of different use classes, including A1 (now E(a)), B8 or sui generis. This demonstrates the use class of a builders' merchant is fact sensitive to the particular circumstances of use.
23. The appellant queries the accuracy of BSDL's accounting data, due to a receipt which allocates a cash purchase for small goods to a trade account. During the hearing, BSDL explained that all cash transactions made to a customer without a trade account are allocated to a generic trade account for accounting purposes. This generic trade account is then used to ascertain the level of sales made to non-trade customers. This is entirely plausible, and gives me no reason to question the accuracy of BSDL's accounting data.
24. The appellant has presented a number of appeal decisions to support its contention that use of the premises falls within Class E(a). However, in contrast to the cases cited, there is detailed evidence before me regarding the breakdown of sales between trade and non-trade customers. This evidence helps ascertain who the site is primarily used by, which is relevant to the application of Class E(a). Such information does not appear to have been before the Inspectors in the cases highlighted, and the absence of such was even noted as an omission in one of them. The evidence pertaining to use is therefore very different in the case before me. Notwithstanding this distinction,

applications for lawful development certificates are particularly fact-sensitive which means the relevance of these appeal decisions is limited in any event.

25. In *Thurrock*¹, it was held that a restriction on those able to buy products from a particular premises meant the corresponding use of the premises was not an A1 (now E(a)) use. This is because the sale of goods could not properly be described as being made to visiting members of the public. Whilst there is no restriction on those who can buy products from the appeal premises in this instance, this factor alone is not determinative of use. For example, car showrooms are open to anyone to visit and purchase cars, yet they are not classed as an E(a) use. The *Thurrock* case is therefore not inconsistent with my conclusions.
26. At one point during the hearing, the appellant suggested a material change of use from a B8 or sui generis use to a E(a) use, may have occurred at some point during occupation of the appeal premises by BSDL. However, the appellant later conceded that use by BSDL had remained broadly consistent throughout its occupation, a position which is shared by the Council and BSDL. I have therefore not addressed this point further.
27. Before the appeal application was made, the Council previously issued an LDC, which confirmed use of the appeal premises within Class E(a) was lawful. However, this decision was later quashed, in part, because BSDL were not consulted. I must determine this appeal on the evidence before me, which includes comprehensive evidence from BSDL in terms of how the appeal premises are used. The quashed decision, which was made without this evidence, therefore carries little weight in my decision.
28. The parties agree that the offices within the site and the professional services offered (which relate to the sale of kitchen and bathrooms) are both ancillary to the site's primary use. Based on the evidence before me and observations made during my site visit, I have no reason to disagree. On this basis, irrespective of which use class these elements may fall into if considered in isolation, they would not affect my conclusion that the primary use of the appeal premises is not within Class E(a).
29. The Council and BSDL both say use of the premises is either a B8 or sui generis use, which the appellant obviously disputes. However, the question before me is whether use of the premises falls within Class E(a). It is not necessary for me to determine the actual use class of the premises, and I make no finding in this regard.

Conclusion

30. For the reasons given above I conclude that the Council's refusal to grant an LDC in respect of use within Class E(a) 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).

James Blackwell

INSPECTOR

¹ *R v Thurrock Borough Council Ex parte Tesco Stores Ltd* [1994] JPL 328

APPEARANCES

FOR THE APPELLANT

Nick Phillips
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FOR THE COUNCIL

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Lara Emerson BSc (Hons) MSc MRTPI

INTERESTED PARTY (BSDL)

Douglas Edwards KC (Francis Taylor Buildings)
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