



Appeal Decisions

Site visit made on 16 November 2023

by E Brownless BA (Hons) Solicitor (non-practising)

an Inspector appointed by the Secretary of State

Decision date: 29 October 2024

Appeal A Ref: APP/X1545/X/22/3298701

The Old Dairy, Broad Street Green Road, Great Totham, CM9 8NX

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the "Act") against a refusal to grant a certificate of lawful use or development (LDC).
 - The appeal is made by JAP Contracts against the decision of Maldon District Council.
 - The application ref: LDE/MAL/21/01004, dated 31 August 2021, was refused by notice dated 23 November 2021.
 - The application was made under section 191(1)(c) of the Act.
 - The failure to comply with any condition or limitation for which a certificate of lawful use or development is sought is described as 'Use of building as office purposes'.
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Decision

1. The appeal is dismissed.

Application for costs

2. An application for costs was made by JAP Contracts against Maldon District Council. This application is the subject of a separate decision.

Preliminary Matter

3. On the application form, when asked to indicate why they were applying for a LDC, the appellant ticked the box for '*an existing use*' rather than '*an existing use, building work or activity in breach of a condition*'. Under the grounds for application of a LDC, the appellant ticked to say that '*the use began more than 10 years before the date of the application*' and they also ticked to state '*the use, building works or activity in breach of condition began more than 10 years before the date of the application*'. It is clear from the evidence before me that the appellant's application for an LDC was on the basis of there having been a breach of condition and thus I have determined the appeal on this basis.

Main Issue

4. The main issue is whether the Council's decision to refuse a LDC was well-founded.

Background

5. The appeal site was acquired by the appellant as part of a wider area of land in 2009 and subsequently planning permission¹ for a material change of use of the wider site (shown edged in blue on the submitted plan) from use as a milk

¹ Planning Reference: FUL/MAL/09/00532

depot to employment and light industrial purposes was granted by the Council on the 17 August 2009 ("the 2009 Permission").

6. Condition 3 (the "Condition") of the 2009 Permissions states: *'the premises shall only be used for industrial purposes which are defined within Classes B1(b) and (c) of the Schedule to the Town and Country Planning Use Classes (Amendment) Order 2005 (or in any provision equivalent to that Class in any statutory instrument revoking or re-enacting that Order) and for no other purpose'*.
7. On 1 September 2020, the Town and Country Planning (Use Classes)(Amendment)(England) Regulations 2020 came into force, amending the Town and Country Planning (Use Classes) Order 1987 (UCO). As a consequence, Class B1 Business was revoked from this date and the UCO created a new broad 'Commercial, business and service' use class (Class E) which incorporates, among other things, offices and other business uses which were formerly part of the (B1) use class. It is the appellants case that the appeal building has been utilised for uses within the former Use Class B1(a) and which are now incorporated within Class E(g)(i) of Part A, Schedule 2 of the Town and Country Planning (Use Classes) Order 1987 (as amended). It is the Council's case that the appeal building has a lawful use as Use Class E(g)(ii) and E(g)(iii). For simplicity, I shall continue to refer to Use Class B1.

Reasons

8. Section 191(1) of the Act states that if a person wishes to ascertain whether (a) any existing use of buildings or other land is lawful; (b) any operations which have been carried out in, on, over or under land are lawful; or (c) any other matter constituting a failure to comply with any condition or limitation subject to which planning permission has been granted is lawful, they may make an application to the local planning authority.
9. In an LDC appeal, the onus of proof is firmly on the appellant to make out their case to the standard of the balance of probabilities. The applicant's own evidence does not need to be corroborated by independent evidence. If there is no evidence to contradict their version of events, or make it less than probable, and their evidence is sufficiently precise and unambiguous, it should be accepted. Issues of planning merit do not fall to be considered. The application before me must be considered in light of the facts and the relevant law.
10. It is the appellant's case that the breach of condition commenced on the 20 July 2010 by reason of the primary use of the appeal building being as Use Class B1(a). In order to show that the Condition has been breached and in order to succeed in this appeal, the appellant would need to demonstrate that the use of the appeal property has been as office (Use Class B1(a)) and that this was the primary use of that building, and that such use had continued, without significant interruption, for a period of at least ten years before the date of the LDC application.
11. Notwithstanding the appellant's claim in relation to the breach of condition having occurred for at least ten years, the appellant also claims that Condition 3 was imposed erroneously by the Council on the 2009 Permission. The appellant argues that the application expressly stated the use of the appeal building was for office purposes. As such, in the first instance, it is appropriate

to consider the awfulness of condition 3 before assessing whether the appellant can show whether the condition has been breached for ten years.

12. In respect of the lawfulness of the condition, the appeal could succeed if the appellant can show that the condition is “Wednesbury unreasonable”, that is, no reasonable planning authority could possibly have imposed it, or if the condition is otherwise invalid. Legal tests of validity were laid down in *Newbury v SSE* [1981] AC 578: A condition must:
 - be imposed for planning purpose not for ulterior reasons;
 - be fairly and reasonably related to the development permitted;
 - must not be so unreasonable that no reasonable planning authority would impose it.
13. Planning permission FUL/MAL/09/00532 was granted for the change of use of the site from a Milk Depot to employment and light industrial (B1) together with extensions and alterations to an existing building. Condition 3 states that *‘the premises shall only be used for industrial purposes which are defined within Classes B1(b) and (c) of the Schedule to the Town and Country Planning Use Classes (Amendment) Order 2005 (or in any provision equivalent to that Class in any statutory instrument revoking or re-enacting that Order) and for no other purpose’*. The reason given for the condition is in order to ensure the appropriate use of the site in relation to neighbouring development and in accordance with policy BE1 of the adopted Maldon District Replacement Local Plan.
14. The Council has drawn my attention to paragraph 1.3 of the Design and Access Statement (DAS) submitted in support of the 2009 application, which states ‘they [the appellant] are a specialist commercial kitchen and bar design and equipment suppliers. They are primarily a design company combined with storage and distribution of new and used equipment.’ As such, it is the Council’s view that a ‘design company’ would fall within previous Use Class B1(b) for research and development purposes, rather than former Use Class B1(a) offices.
15. Turning to Use Class B1: Use for all or any of the following purposes-
 - (a) As an office other than a use within class A2 (financial and professional services),
 - (b) For research and development of products or processes, or
 - (c) For 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.
16. The UCO interprets an ‘industrial process’ as entailing a process for or incidental to any of the following purposes:-
 - (a) the making of any article or part of an article (including a ship or vessel, or a film, video or sound recording);

- (b) the altering, repairing, maintaining, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article; or
 - (c) the getting, dressing or treatment of minerals;
- in the course of any trade or business other than agriculture, and other than a use carried out in or adjacent to a mine or quarry.
17. There is no guidance on the interpretation of the wording of 'research and development of products or processes' within the UCO. The Oxford English dictionary meaning of 'research and development' references 'work that tries to find new products and processes or to improve existing ones'. The Council have referred to the National Land Use Database: Land Use and Land Cover Classification (February 2006) however, this does not assist with providing a relevant definition.
18. A planning permission is a public document; the approach is to consider what the reasonable reader would understand the words to mean in the context of the overall purpose of the planning permission and with common sense. If something is not clear but the planning permission clearly incorporates the application and plans, they may be useful aids to interpretation or to understanding the scope of what is permitted. It is permissible to look at extrinsic evidence including the application form and other documents, depending on the circumstances of the individual case.
19. The appellant has provided a plan dated July 2018 showing a reception area, four offices, a kitchen, toilets and a garage. The submitted DAS explained that the appellant is 'primarily a kitchen and bar design company, combined with storage and distribution of new and used equipment'. The appellant goes on to describe their business operation as being concerned with the purchase and installation of kitchens, and although they are described as being 'bespoke', the creation of individual and customised designs does not in my view amount to research and development whereby work is undertaken to produce new products and processes or to improve existing ones. Nor would it amount to any industrial process as it does not involve a process for or incidental to the making, alteration, repair, maintenance, ornamenting, finishing, cleaning, washing, packing, canning, adapting for sale, breaking up or demolition of any article or concern any minerals. In my view, the proposed use described by the appellant within the DAS accompanying Planning Permission FUL/MAL/09/00532 (the Planning Permission) would not fall within the remit of Use Class B1(b) or B1(c).
20. Accordingly, I consider that in imposing Condition 3, the Council imposed a condition which resulted in a development which, in substance, was not that which was applied for.
21. Whilst I have not been provided with the plans that accompanied the Planning Permission, the layout of the site is described in the DAS and it seems quite clear that one building would be laid out as offices and the other would be laid out as stores. As such, this arrangement is inconsistent with the condition, and I therefore consider Condition 3 to be invalid.
22. An invalid condition may only be removed, and the planning permission allowed to stand, if the condition deals with some ulterior, collateral or trivial matter

rather than being a condition that goes to the root of the permission. In this instance, Condition 3 is of fundamental importance to the permission and, as it would alter the whole character of the development, it is therefore inseverable. As a consequence, where a condition cannot be severed from the grant of planning permission the resultant effect would be that the planning permission cannot stand either.

23. Even so, that does not mean that an office use would have been lawful at the date of the LDC application. For the purposes of assessing the LDC application, the baseline against which the stated use of the site needs to be assessed against is that of the milk depot, a sui generis use. Use of the appeal building as an office would be a material change of use and as such this would amount to development. As no planning permission was granted for that development, I shall therefore consider whether the use was lawful for any other reason.
24. It is the appellant's case that the appeal building has been used as a 'contracting office' for the appellants' commercial kitchen operation which is concerned with the purchase and installation of bespoke commercial kitchens. The date when the use of the building as an office is stated to have commenced is the 20 July 2010.
25. Section 191(2) of the Act sets out that uses and operations are lawful at any time if no enforcement action may then be taken in respect of them (whether because they did not involve development or require planning permission or because the time for enforcement action has expired or for any other reason); and they do not constitute a contravention of any of the requirements of any enforcement notice then in force.
26. At section 171B, the time limits for taking enforcement action are set out, with subsection (3) explaining that in respect of any other breach of planning control no enforcement action may be taken after the end of the period of ten years beginning with the date of the breach. To succeed in this appeal, the appellant will therefore need to demonstrate, on the balance of probabilities, that the material change of use began on or before 31 August 2011 and continued without significant interruption for at least ten years thereafter.
27. The appellant's agent confirms that he has been involved with the property since April 2013 and that during that time it has been used without interruption for Use Class B1(a) office purposes. There is little detailed information about how regularly the agent visited the site, nor what he observed, nor detailed account to explain how the appeal building was actually used. No contemporaneous notes of any visit have been provided. Reference to 'many visits over the years' is vague and ambiguous and the agent has provided no explanation as to what they consider the meaning of 'without significant interruption' to be. Even if I were minded to accept the agent's evidence, his involvement with the property spans a period of time that falls short of the requisite 10 year period and there is little first hand account of how the property was used before April 2013.
28. The submitted photographic evidence purports to show the appeal building in use as Use Class B1(a) Office. A number of rooms can be seen containing office type furniture and equipment. However, the photographs are dated 26 April 2013 and they provide only a snapshot in time and do not show how the building was used prior to 26 April 2013.

29. A letter from the Police (28 July 2010), a certificate of compliance (July 2010) and an annual maintenance/monitoring agreement (11 August 2010) have been provided. These documents confirm the installation and ongoing maintenance of an intruder alarm system at The Old Dairy, Broad Street. However, the submitted 'Specification', which refers to the location and position of several detectors and surface contacts, includes an installation address of 'JAP Contracts, New Offices, Tiptree Road, Gt Totham' which is not the address of the appeal site that has been provided. Moreover, these documents simply confirm the installation of security features at the site and they provide little evidence regarding the actual use of the appeal building.
30. The submitted email correspondence between the appellant and their computer support company provides confirmation of a change of address, however, it fails to show how the appeal building was actually used as a primary Use Class B1(a) office use. Similarly, whilst a letter from the appellant's accountant also provides confirmation of a change of address in July 2010, it provides little evidence about how the appeal building has been used.
31. A number of previous appeal decisions² and the Council's Officer Report³ ("OR") have been provided in support of the appeal. However, in respect of the appeals, the Inspectors visited the site in 2017 and 2021 and therefore these visits are only a snapshot in time and they provide little information about the actual use of the appeal building before April 2013. There is reference in the OR to the host building being in use as an office at that time but activities being undertaken and the layout of a site may change over time and therefore, the OR and previous appeal decisions are only relevant for a snapshot in time and they do not provide evidence of a breach of condition having occurred continuously for a ten year period.
32. The Design and Access Statement (DAS) which supported the application for the 2009 Permission has also been submitted. My attention has been drawn to a reference contained therein which states that the business would employ eight people, most of whom would work in the office building. However, this provides little confirmation of what has actually occurred within the appeal building.
33. I therefore find that the appellant's evidence is not sufficiently precise and unambiguous and has therefore not demonstrated, on the balance of probabilities, that a material change of use of the building for office purposes as Use Class B1(a) began on or before the 31 August 2011 and continued without significant interruption for at least ten years thereafter.

Conclusion

34. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of 'Use of building as office purposes' was well-founded and that the appeal should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the Act.

E Brownless

INSPECTOR

² Appeal Reference APP/X1545/W/16/3154913 and APP/X1545/W/20/3257575

³ Planning Reference: COUPA/MAL/14/00554