



Appeal Decision

Site visit made on 15 January 2025

by Chris Preston BA (Hons) Town and Country Planning, Bachelor of Planning (BPI), MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 March 2025

Appeal Ref: APP/Z1510/X/22/3306092

Unit 5, The Mazes, East Street, BRAINTREE, Essex, CM7 3JJ

- 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 Mr N Shah (M A Ashley & Sons Ltd) against the decision of Braintree District Council.
 - The application ref 21/03751/ELD, dated 29 December 2021, was refused by notice dated 8 July 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 described on the application form as: Used as a light Industrial building within the user clause of B2-B8 for over 50 years but supported by documentary evidence of 32 years.
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Decision

1. The appeal is dismissed.

Reasons

2. As with any application or appeal relating to a Certificate of Existing Lawful Use (CLUED), the planning merits of any given use are not relevant to my decision. The main issue is whether the use described was lawful at the time the application was made and whether the Council's decision to refuse to grant a CLUED was well-founded based on relevant facts and any relevant judicial authority.
3. The relevant test is the balance of probability. As set out within the Government's Planning Practice Guidance (PPG) an applicant is responsible for providing sufficient information to support an application. In respect of an existing use if a local planning authority has no evidence itself, nor any from others, to contradict or otherwise make the applicant's version of events less than probable, there is no good reason to refuse the application, provided the applicant's evidence alone is sufficiently precise and unambiguous to justify the grant of a certificate on the balance of probability¹.
4. The existing use for which a certificate was sought was described in the application form, as set out in the banner heading above. In addition to the description of the use, which refers to "user clause B2-B8", section 4 on the form suggested that the existing use was within Class B1(c) of the Town and Country Planning (Use Classes) Order 1987 (as amended) (the UCO).

¹ Paragraph: 006 Reference ID: 17c-006-20140306

5. That created some ambiguity because Class B1(c) is a use for any industrial process 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 or dust. Class B2 on the other hand is for the carrying on of any industrial process, other than within Class B1 and Class B8 relates to a use for storage or as a distribution centre. The term “light industry” is, in my experience, generally applied to uses falling within Class B1 whereas the description refers to Use Classes B2-B8. Moreover, the description did not specify whether a certificate was sought for a B2 or B8 use or a combination of both. Thus, there was a lack of precision in the original application in terms of the way in which the existing use was described.
6. The Council sought clarity from the applicant prior to determining the application. The response stated that: *In respect of users clauses the clause applicable in the circumstances would be B2 - General Industrial, which is defined as a “use for the carrying on of an industrial process other than one falling within class B1 above or within classes B3 to B7 below”².*
7. The response also provided copies of leases relating to the building dating from 1989 to 2014 and then from 2017 to 2022. Those leases permitted occupation within Use Classes B1, B2 & B8 of the UCO but the applicant considered that the actual use of the building fell within B2 on the basis that the first occupier “dealt in the trade of retail and wholesale sale of motor vehicle spare parts and had delivery and counter sales”, and the second “operated as a vehicle repair shop, as well as a reseller of second hand vehicles”.
8. That appears to be the basis upon which the Council determined the application. The appeal form subsequently described the use for which a certificate was sought as; “classification as “B2” Sept 1989-Sept 2014 as Car parts distribution and trade and retail sale. Sept 2014-to Mar 2022, vehicle repair and sales”. The appeal form also stated that the actual use at the time of submitting the application to the Council was as a vehicle repair unit with second hand sales.
9. In view of the above, I have determined the appeal on the basis of the use existing use described within the appeal form and associated statement of case and on the information provided, including the correspondence between the parties at the application stage relating to the nature of the use for which a certificate is sought.
10. Notwithstanding the response to the Council at the application stage the way in which the use is described in the application and appeal documentation remains ambiguous. Whilst the appellant seeks a CLUED for a use within Class B2, the actual use between 1989 and 2014 was said to include a mix of “car parts distribution” and “trade and retail sale”. It is not readily obvious that a combination of those uses would fall within a general industrial use under Class B2. In terms of the UCO, a distribution use would seem to fall under Class B8 and retail sales would not fall under a general industrial use.
11. No supporting information is provided to enable any analysis of the proportion of retail sales compared to distribution of parts or vice-versa or whether the scale of the component activities varied over the period from 1989 to 2014. If distribution was the primary function, with an ancillary amount of sales, it is possible that such a use would fall within Class B8. However, if neither component was ancillary to

² Email, dated 01 June 2022, from Navin Shah to Ms Hunter and Ms Lester of the LPA

the other the overall use may have been a mixed use which did not fall neatly into one use class or the other; *sui generis* as commonly referred to in planning terms.

12. On the scant information before me it is impossible to gain an accurate understanding of whether one element was the primary use with other aspects ancillary to it or whether the retail and distribution elements were such that a mixed use of the site was taking place. If there was notable fluctuation between various elements that itself could have led to a material change of use or multiple changes of use over the period in question for which planning permission may have been required. That is not uncommon over such a long period where the component elements may fluctuate, even for an established business.
13. The only evidence provided in relation to the use over that period is the lease for a 25 year period for a tenant under the name of GKN Autoparts Distribution Ltd. Under Clause 1.8 the “permitted user” was stated as being within Class B8 of the UCO “or such other use as falls within Class B1 or B2”. Thus, the lease did not define the precise nature of the activities that could take place in planning terms and had a degree of flexibility within it. Notwithstanding the flexibility of the lease, planning permission would still have been required if there was a material change of use between the various “B” classes, subject to any permitted development rights that may have existed at the time³. However, such permitted rights would not have applied to a mixed use falling outside any defined class.
14. The fact that the building was leased to the same company for such a period of time may be evidence of continuity but entering into a lease itself is not necessarily evidence of the precise nature of the activities carried on by the tenant, for the reasons set out above. Nor does the existence of the lease discount the possibility that there could have been gaps in occupation. Consequently, the information provided is ambiguous as to the nature of activity carried on by GKN Autoparts Distribution Ltd.
15. Accordingly, the information is not sufficient to demonstrate what the precise use of the building was over that period, let alone whether it was or became lawful. Thus, the Council was justified in seeking further information from the appellant, for example, first hand witness statements or affidavits of the activities that took place, business records and the like.
16. The same issues apply to the period after 2014. The lease entered into for the period 2017 to 2020 (and subsequently carried over up to 2022) was also flexible with reference to occupation falling within Class B1, B2 or B8. The appellant described the nature of the business as being a vehicle repair workshop with second hand car sales. In the absence of any further information the extent of scale of vehicle sales comparative to the scale of repairs makes it difficult to ascertain the nature of activity that was taking place or whether it was materially different to that which took place under the previous occupants. On its face, the repair and sale of vehicles would appear notably different in character than a use involving distribution of vehicle parts with wholesale and counter sales.
17. It is not clear if it fell within Use Class B2 as claimed by the appellant. That could be possible if vehicle repairs were the primary use but equally it could be that the use was a mixed use between repair and sales or even that sales were the primary use with occasional repair of cars getting them ready for sale. In the

³ No case has been advanced in that regard.

absence of any information other than the lease and a very basic description it is impossible to know.

18. Drawing all of that together the information submitted in respect of the application and appeal falls well-short of that required to demonstrate an existing lawful use. It is not clear if the was in Class B2 at the time of the application as claimed by the appellant or that it ever was. The basic description of business activities since 1989 casts some doubt on that and the leases do not add any clarity given their flexible nature. Even the use did fall within Class B2 at some point, there is nothing to corroborate that it continued for a ten-year period without interruption or without a change to some other use, such as to establish immunity from enforcement action through the passage of time.
19. The appellant's case is largely centred on the argument that the Council has not provided any information of its own to discount the probability of the appellant's evidence. However, for the various reasons set out, the appellant's evidence lacks clarity and is ambiguous as to the precise nature of activities that took place over the period from 1989 up to the date of the application. There is no information at all before 1989.
20. In light of the above it goes without saying that, on the balance of probabilities, I cannot conclude that the existing use described by the appellant was lawful at the date the application was made. Therefore, the Council's decision to refuse the application was well-founded and I shall dismiss the appeal. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act (as amended).

Chris Preston

INSPECTOR