The Planning Inspectorate

Appeal Decision

Site visit made on 10 May 2013

by C A Thompson DiplArch DipTP Reg Arch RIBA MRTPI IHBC

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 28 May 2013

Appeal Ref: APP/W1715/X/12/2188688
Tollbar Way, Units 1(A+B), 2, 3+4, Bradbeer Retail Park, Southampton SO30 2QU

- The appeal is under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 (the Act) against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is by Ram Capital Ltd against the decision of Eastleigh Borough Council.
- The application Ref U/12/71277, dated 27/07/2012, was refused by notice dated 25 September 2012.
- The application was made under section 192(1)(a) of the Act.
- The application concerns condition 8 attached to Permission Z/28673/11 which refers to the "principal goods" that can be sold. It seeks confirmation that "principal goods" refers to 51% or more, and therefore 49% of the floorspace can be used for the sale of any goods.

Decision

1. The appeal is allowed and attached to this decision is a certificate of lawful use or development describing the proposed use which is considered to be lawful.

Procedural Matters

2. The site address set out in the Appeal Questionnaire referred just to Units 1A and 1B which were not differentiated on the plans. But the parties agreed, and the LDC application confirmed, that the questionnaire address is in error. The appeal applies to all the units at the retail park; that is numbers 1A, 1B, 2, 3 and 4.

3. The wording of the use for which the LDC is sought also needs clarification. Further representations have suggested some more appropriate alternatives. On reflection I believe the wording of the applied for LDC would be clearer if it were amended to read …*The use of up to 49% of the existing floorspace of each of the retail units for the sale of goods within Class A1 of the Town and Country Planning (Use Classes) Order 1987, as amended, is lawful pursuant to condition 8 of planning permission Z/28673/11 dated 11 July 1989*… (It should also be noted that the decision notice issued by the Council, in regard to the appeal application, wrongly refers to condition 8 of planning permission Z/28675/11.)

4. It is on the basis of my paragraphs 2-3, above, that I undertook the site inspection and have determined the appeal.

Reasons

5. An LDC is just a snap-shot in time. It is concerned simply with whether what is applied for would be lawful at the time the application was made. Such matters as the impact of the scheme on the environment, the local economy or the content of planning policy, are not relevant. My decision is concerned solely with an interpretation of planning law set against matters of fact and degree.

6. This case centres upon an analysis of planning condition 8, attached to planning permission Z/28673/11 (the 1989 permission), which states that …*the principal goods sold from the retail warehouses must be restricted to any of the following: DIY materials and building supplies, furniture and carpets, domestic electrical appliances, auto accessories, garden equipment and materials, boats*… The reason for the condition was …*to protect the viability of local shopping centres as a whole*…

7. It is a long established rule that planning permissions are to be interpreted in a common sense manner. They run with the land unless, unusually, they are made personal to the applicant and /or are for a temporary period. Considerable importance is attached to the property and ownership implications of the grant of such permissions because the control of development under the planning acts restricts what an owner could normally expect to be able to do with his property.

8. The decision in *I'm Your Man v SSE (1999) 77P&CR 251* was about limits to planning permissions. It concerned the decision of an Inspector who had granted what he thought was a temporary planning permission but failed to add a condition to that effect. Mr Robin Purchas QC, sitting as a deputy judge, found that neither the Secretary of State nor the LPA had the power to impose limitations on planning permissions which had been granted other than by a Development Order. The Inspector could have imposed a *temporary* planning condition should he have so wished. His decision not to impose such a condition was not challenged and the Court could not now imply a condition within the planning permission. For that reason, and despite a description of the development which referred to an application for temporary planning permission, it was held that the permission actually granted was a permanent one.

9. The inescapable implication of *I'm Your Man* is that if something is not specifically controlled, through necessary conditions attached to the planning permission, then it is permitted. The judgement underscores the considerable importance that the courts attach to the principle that members of the public are entitled to rely upon planning permissions and the rights they convey.

10. In this case the wording of condition 8, of the 1989 permission, makes it clear that the controls being applied are to a part, but not all, of the sale of goods in the permitted retail warehouses.

11. In this instance the word *principal* is the key one. Using the Concise Oxford English Dictionary, it means *first order of importance* or *main*. To my mind this indicates clearly that more than half of the goods sold in the retail warehouses (that is at least 51% of them) are controlled by condition 8. It follows, as a matter of logic, that because the planning permission was for retail (warehouse) use then the other retail uses (up to 49%) would be non-

restricted. These other retail sales could be for Class A1 retail goods (as set out in the Town and Country Planning (Use Classes) Order 1987, as amended) or indeed any other retail goods. The appeal should therefore be allowed and an appropriate LDC issued.

12. In reaching this conclusion I have taken into account the other matters raised. As set out by Keene J, in *R v Ashford Borough Council ex parte Shepway District Council [1999] 2PLCR 12, QBD* the *express reasons* for imposing a condition is part of the decision. This might well be for the purpose of interpreting the planning permission but I do not accept that such *express reasons* can be used to limit the normal meaning, or lawful effect, of the condition's common sense interpretation.

13. I agree that condition 8 of the 1989 permission is to some extent ambiguous in that it does not state which particular measure should be used to calculate the appropriate proportion of retail goods that are controlled. But I have to determine the appeal which is before me: the LDC applied for specifically relates to the control of sales relative to percentages of floorspace. This gauge seems to me to be an entirely appropriate means of control.

14. I do not agree that allowing the appeal would make it more difficult for the Council to take necessary enforcement action to ensure compliance; should such action be necessary. It would be possible to see what areas of floorspace were used for the sale of particular goods and such areas would be measurable. But even if enforceability was more difficult this is not something which should override the normal meaning, or lawful effect, of the condition's common sense interpretation.

15. I realise my decision runs counter to the conclusions of the Inspector in the quoted Edgware Road appeal. But Mr Brown's case involved an Oriental Cultural centre where the goods sold would need to have a mainly eastern flavour if the centre were to retain its Oriental character. I can understand why the maintenance of such a character would need a substantial proportion of the goods, significantly more than half, to be controlled.

16. This appeal scheme is different. It is an ordinary retail warehouse development and its buildings would retain their *warehousing* character, by their design and size, following the issue of any applied for LDC. In such a case a strict arithmetical assessment is as good a gauge as any for determining the amount of principal goods sold. Indeed, if the Council wanted the condition to be otherwise interpreted it could have specified the actual percentage of goods it considered was appropriate, or limited the sale of all the goods to the specified ones, but chose not so to do. In the absence of such stated percentages, or absolute limitations, the common sense meaning of the condition should prevail. In any event I have determined this appeal on its own merits as I am required to do.

Colin A Thompson

The Planning Inspectorate

Lawful Development Certificate

TOWN AND COUNTRY PLANNING ACT 1990: SECTION 192
(as amended by Section 10 of the Planning and Compensation Act 1991)

TOWN AND COUNTRY PLANNING (DEVELOPMENT MANAGEMENT PROCEDURE) (ENGLAND) ORDER 2010: ARTICLE 35

IT IS HEREBY CERTIFIED that on the 27/07/2012 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and edged red (Units 1A, 1B, 2, 3+4) on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The word principal, as used in condition 8 of planning permission Z/28673/11 dated 11 July 1989, in regard to the sale of goods, means the "first order of importance" or "main" so that more than half of the floorspace would be controlled (that is at least 51%) by the condition. It follows, as a matter of logic, that the remainder of the floorspace (a maximum of 49%) could, lawfully, be for unrestricted, or Class A1, Retail sales.

Signed

Colin A Thompson
Inspector

Date 28.05.2013
Reference: APP/W1715/X/12/2188688

First Schedule

The use of up to 49% of the existing floorspace, of each of the retail units, for the sale of goods within Class A1 of the Town and Country Planning (Use Classes) Order 1987, as amended, is lawful pursuant to condition 8 of planning permission Z/28673/11 dated 11 July 1989…

Second Schedule

Land at Tollbar Way, Units 1A and 1B, 2, 3+4, Bradbeer Retail Park, Southampton SO30 2QU

NOTES

This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, was not liable to enforcement action, under section 172 of the 1990 Act, on that date.

This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use is only conclusively presumed where there has been no material change, before the use is instituted, in any of the matters which were relevant to the decision about lawfulness.

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Plan

This is the plan referred to in the Lawful Development Certificate dated:28.05.2013

by C A Thompson DiplArch DipTP Reg Arch RIBA MRTPI IHBC

Land at: Tollbar Way, Units 1A+1B, 2, 3+4 Bradbeer Retail Park, Southampton SO30 2QU

Reference: APP/W1715/X/12/2188688

Scale: NTS

