The Planning Inspectorate

Appeal Decisions

Hearing held on 10 September 2013
Site visit made on 10 September 2013

by Graham Dudley BA (Hons) Arch Dip Cons AA RIBA FRICS

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

Decision date: 28 October 2013

Appeal A: APP/U2615/X/13/2196040
B & Q Plc, 1 Pasteur Retail Park, Thamesfield Way, Great Yarmouth NR31 0DH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by White Swan Properties Limited against the decision of Great Yarmouth Borough Council.
- The application Ref 06/12/0740/EU, dated 12 December 2012, was refused by notice dated 11 February 2013.
- 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 retail sales.

Appeal B: APP/U2615/X/13/2196047
Units 2 – 4 Pasteur Retail Park, Thamesfield Way, Great Yarmouth NR31 0DH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by White Swan Properties Limited against the decision of Great Yarmouth Borough Council.
- The application Ref 06/12/0741/EU, dated 12 December 2012, was refused by notice dated 11 February 2013.
- 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 retail sales.

Appeal C: APP/U2615/X/13/2196051
5 Pasteur Retail Park, Thamesfield Way, Great Yarmouth NR31 0DH

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991 against a refusal to grant a certificate of lawful use or development (LDC).
- The appeal is made by White Swan Properties Limited against the decision of Great Yarmouth Borough Council.
- The application Ref 06/12/0742/EU, dated 12 December 2012, was refused by notice dated 11 February 2013.
- 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 retail sales.

Preliminary Matters

Appeal A

1. Relates to development for an A1 retail DIY store, garden centre associated car parking, landscaping and community facilities and housing (ref 06/98/0969/O).

2. Condition 4 of the planning permission states 'The premises shall not be used otherwise than for the sale of goods consisting of DIY products; DIY home improvements, building products, garden products including garden furniture and accessories and plants, together with a coffee shop as ancillary to the main use unless the prior approval of the local planning authority'.

3. The reason for the condition is 'The site is outside any area zoned for shopping development in the Great Yarmouth Borough Wide Local Plan'.

Appeal B

4. Relates to development for A1 non-food retail warehouse units with access and service roads, car park, landscaping and associated services (ref 06/03/0538/F as varied).

5. Condition 3 of the 2003 planning permission states, 'The premises shall only be used for the sale of bulky comparison goods consisting of building and DIY products; garden products and plants, pets and pets supplies, furniture, carpets, floor coverings and house hold furnishings, electrical and gas, vehicle accessories and parts, bicycles and cycle accessories, office supplies, computers and accessories and boating equipment (excluding boats) and any other goods which are ancillary and related to the main goods permitted'.

6. The reason for the condition is 'For the local planning authority to retain control over the goods sold in order to minimise the impact of the development on the vitality of the town centre'.

Appeal C

7. The relevant planning permission was associated with a variation of the above permission described as 'variation of condition 3 of planning permission no 06/03/0538/F (ref 06/03/1112/F).

8. Condition 1 states, ''The premises shall only be used for the sale of bulky comparison goods consisting of building and DIY products; garden products and plants, pets and pets supplies, furniture, carpets, floor coverings and house hold furnishings, electrical and gas products, vehicle accessories and parts, bicycles and cycle accessories, office supplies, computers and accessories and boating equipment (excluding boats) and any other goods which are ancillary and related to the main goods permitted; all other non food goods, with the exception of fashion clothing and footwear, may also be sold by a catalogue retailer only'.

9. The reason for the condition is 'in accordance with the terms of the application and to protect the vitality of the town centre'.

Decisions, Appeals A, B and C

10. The appeals are dismissed.

Main Issues

11. The main issues are:-

- In each case whether the imposed conditions exclude the rights enjoyed under the provisions of The Town and Country Planning (Use Classes) Order 1987 [UCO] and Town and Country Planning Act 1990 [TCPA], all as amended.
- Whether the application is valid, being made in relation to section 191 and not Section 192 of the Town and Country Planning Act 1990.

Conditions

12. It is common ground that in principle the various conditions imposed are reasonable, related to planning and the permission granted, and are precise. There is no case made in relation to necessity. The issue relates to whether the conditions are sufficient to exclude the provisions of the UCO and rights provided by the Town and Country Planning Act 1990 [TCPA].

13. The cases of Carpet Décor (Guildford) Ltd v Secretary of State for the Environment and Guildford Borough Council [Carpet Décor] and Dunoon Developments v Secretary of State for the Environment and Poole Borough Council [Dunoon] indicate that to exclude the statutory provisions there needs to be 'express exclusion' of their effect or be in 'unequivocal terms'.

14. Circular 11/95 – The use of conditions in planning permissions, which provides guidance and model conditions, advises that it is possible, but exceptional, for conditions to restrict further development that might be permitted under the UCO or TCPA. The associated model condition (48) suggested is 'The premises shall be used for and for no other purpose (including any other purpose in Class . ... of the Schedule to the Town and Country Planning (Use Classes) Order 1987, or in any provision equivalent to that Class in any statutory instrument revoking and re-enacting that Order with or without modification)'.

15. The case of The Rugby Football Union v The Secretary of State for Transport, Local Government and the Regions [Rugby] indicates that there does not have to be actual reference to the UCO and the removal of associated rights. In that case the wording of the condition provided that the stand in question shall only be used ancillary to (or in connection with) the main use of the premises as a sports stadium, and for no other use without the council's prior written consent. The judge in that case noted specifically the words 'for no other use' were sufficiently clear for the exclusion of the GDO in relation to the stands in question.

16. In Carpet Décor the description of the development was in terms 'as store for papers of National Provincial Bank Ltd. and as residence for caretaker in employ of said Bank, but for no other type of store or for any other person or corporation'. It was said by Sir Douglas Frank QC that as a general principle where a local planning authority intended to exclude the operation of the Use Classes Order or the General Development Order, they should say so by the imposition of a condition in unequivocal terms. In the absence of such a condition it must be assumed that those orders will have effect by operation of law. Carpet Décor can be distinguished from the appeal cases, as there are

conditions to be considered, it is not a situation where the local planning authority is relying directly on the description of the development.

17. In Dunoon there was a specific condition related to limitation of use. It read 'that the use of the proposed premises shall be limited to the display, sale and storage of new and used cars – together with an administrative centre and the preparation of vehicles including facilities for cleaning, polishing and for such essential auxiliaries as general routine inspection of engine, brakes, steering and lighting.' The reason for the condition was 'to retain the amenities of the high class, predominantly residential area'.

18. In the court of appeal the judge noted that the case turned on the interpretation of the word limited in its context. He noted the words were less emphatic than words used in the City of London Case (*the premises should be used as an employment agency and for no other purpose*). He concluded that the word limited was directed to the construction of the condition and not addressed to the question of whether the planning permission should be excluded from the operation of the GDO. In this case there was direct consideration of whether 'limited to' could be equated to 'and for no other purpose'. He noted that the condition did not expressly exclude the GDO and that the words themselves in their context did not imply exclusion of the GDO.

19. I have also taken into consideration Telford and Wrekin Council v Secretary of State for Communities and Local Government [Telford]. In that case the relevant condition noted 'prior to the garden centre hereby approved opening, details of the proposed types of products to be sold should be submitted to and agreed in writing by the local planning authority'. The judgement there was that the condition did not contain a prohibition on selling goods other than those in the list, and no express exclusion in relation to the GDO. In my view, this wording of the condition and reason taken together are different from that of the conditions in these appeals and was clearly to control the ambit of what was sold.

20. There is no explicit reference to the exclusion of the provisions of the GDO in any of the conditions in Appeals A, B and C as promoted above and Circular 11/95.

Appeal A

21. The description of the development indicates a non-food retail warehouse unit use and this is then backed up by condition 4, so it is different from Carpet Décor in that respect. The condition makes no express reference to the UCO, but that is not necessarily essential according to the Rugby decision. Dunoon noted no express exclusion of the GDO and then went on to also say there was no implied exclusion, suggesting that either one or both should be considered. In Appeal A I consider the wording to be plain. The word limited has not been used but the commanding and precise phrase of 'shall not be used otherwise than for the sale of goods…..' has been used. In the Dunoon case it was held that the wording 'shall be limited to' etc. did not imply 'and for no other purpose', but in Appeal A it is clear, when fairly read in the context of the permission as a whole, including the description of the development and the reason for the condition, that the wording 'shall not be used otherwise than for the sale of goods consisting of DIY products' is plain and in my view, equivalent to 'for no other purpose'. It is not merely describing the ambit of the permission granted, but specifically indicating the limitations of the use. I

therefore consider that it does reasonably and unequivocally imply exclusion of the UCO and TCPA in terms of change of use.

Appeals B and C

22. Similarly, while Appeals B and C are worded differently from Appeal A, importantly in my view, the word 'only' is included. That clearly indicates that there is only one use that would be acceptable. When this is read in conjunction with the description of the application and reasons for attaching the conditions, including 'minimise the impact of the development on the vitality of the town centre', it is clear the intention was to specifically limit the use of the building. I note that in the Rugby case the words 'shall only be used' were also backed up by 'for no other use' which the judge highlighted. There is no comment as to whether 'shall only be used' would have been effective in that case on its own.

23. To my mind 'only be used' for and 'for no other use' have very much the same meaning and outcome. If something can only be used for one purpose, quite clearly it cannot be used for something, and vice verse. To my mind the use of 'shall only be used for' in these cases is precise and indicative of no other use being permitted and when read with the description and reasons for the condition, would inform any reasonable reader that the unequivocal position would be that the use of the buildings is restricted in relation to the UCO and TCPA. I therefore also consider that the conditions in Appeals B and C do reasonably and unequivocally imply exclusion of the UCO and TCPA in terms of change of use.

24. In coming to this view, I have taken into consideration other appeal decisions, but have based my conclusions on the facts of this case and the court cases identified with reasons as set out above.

25. Therefore, Appeals A, B and C do not succeed on this issue.

Section 191 or 192

26. Section 191(1)(a) is for a person that wishes to ascertain whether any existing use of buildings or other land is lawful, and Section 192(1)(a) for a person that wishes to ascertain whether any proposed use of buildings or other land is lawful. The appellant confirmed at the hearing that the applications are made under Section 191(1)(a). Its argument is that the relevant conditions do not affect the statutory rights and it is lawful to use the buildings to retail different products because of the provisions of the Use Class Order and as permitted by Section 55 of The Town and Country Planning Act, so any variation of products sold would effectively be an 'extension' or part of the permitted current use for retailing products and would not be a change of use.

27. In my view, an application under these sections is to see if what is already occurring or what is proposed would be lawful. In relation to Section 191 there is no requirement for such a change to be a 'material change' but simply for that change to have already occurred. The application could well be to determine whether a change that has occurred is a material change requiring planning permission. Section 192 is to determine changes that have not occurred, but which are proposed. Again it is not necessary to have decided that such a change would be material, as that may well be what is the main issue for the application. In this case there is no argument that the current uses conform to the conditions imposed and the changes being considered are

effectively 'proposed' for the future. Therefore, I consider that the application, which is for a change in the use in the future and not an existing use, should have been made under Section 192(1)(a) and not 191(1)(a). In coming to this conclusion I have taken into consideration that some other similar applications that have gone to appeal and the courts have been made under Section 191. I am not aware of whether this was a particular issue or whether the matter of the correct section was given any particular consideration. However, in this case it is an issue and my conclusion is that because what is the subject of the appeal has not yet occurred it is appropriate for the application to be made under Section 192(1)(a). The appeals do not succeed in this respect.

28. For the reasons given above I conclude that the Council's refusal to grant a certificate of lawful use or development in respect of Appeals A, B and C was well-founded and that the appeals should fail. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

Graham Dudley

Inspector

APPEARANCES

FOR THE APPELLANT:

Mr A Fraser-Urquhart	Of Counsel
Mr W Edmonds BA Hons Dip MRTPI	Partner, Montagu Evans
Ms P Moss	Montagu Evans
Ms C Tull	

FOR THE LOCAL PLANNING AUTHORITY:

Mrs H Townsend
Mr D Minns
Mr G Clarke

INTERESTED PARTIES:

Mr J Newman	Town Centre Manager

DOCUMENTS

Document 1 Council's outline submissions with file of relevant cases