



Unit 4, Fall Bank Industrial Estate, Dodworth, Barnsley, S75 3LS (“the Property”)

Application for a Certificate of Lawfulness of Existing Use

Supporting Statement

1. Introduction and background

1.1 This application (“**the Application**”) is submitted pursuant to section 191 of the Town and Country Planning Act 1990 (“**the 1990 Act**”). The Application seeks a Certificate of Lawfulness of Existing Use or Development (“**CLEUD**”) for the use of the Property as a retail warehouse in breach of condition 5 attached to planning permission 2012/08512.

1.2 The Application is submitted on behalf KDA Wholesales Limited (“**KDA**”). KDA is freehold owner of the Property, which is registered at HM Land Registry with title number SYK117262 (please see **Appendix 1**).

1.3 Planning permission 2012/08512 was granted on 26 September 2012 for “*Change of use from B1, B2, B8 factory unit to Trade Warehouse*” (“**the Planning Permission**”).

1.4 Condition 5 attached to the Planning Permission states:

*Before the building is brought into use a scheme shall be submitted to and agreed in writing by the LPA to demonstrate that the proportion of the total annual retail sales generated by sales to the public under the retail club scheme shall not exceed 20%. The approved scheme shall be implemented prior to the use and retained thereafter (“**the Planning Condition**”).*

1.5 A scheme submitted pursuant to the Planning Condition was approved on 1 November 2012, but on analysis of customer information dating back over ten years, it is evident that the Planning Condition has been breached for in excess of ten years.

2. Legal framework

2.1 Section 191(1)(c) of the Town and Country Planning Act 1990 (“the **Act**”) provides that if any person wishes to ascertain whether a 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 for that purpose to the local planning authority, describing the matter.

2.2 Section 191(3) of the Act further provides that a breach of condition is lawful at any time if:

(a) the time for taking enforcement action has expired; and

(b) it does not constitute a contravention of any of the requirements of any enforcement notice or then in force.

2.3 Section 171B(3) of the Act applies to a breach of condition, and provides that no enforcement action may be taken “*after the end of the period of ten years beginning with the date of the breach*”.

2.4 Section 191(4) of the Act provides that if, on an application under section 191, the local planning authority is provided with information satisfying them of the lawfulness of the matter at the time of the application, or that description as modified by the local planning authority or a description substituted by them, they shall issue a certificate to that effect.

2.5 Section 191(5) of the 1990 Act requires a certificate issued pursuant to section 191 to specify the land to which it relates, describe the use, operations or other matter in question, give reasons for determining the use, operations or other matter to be lawful and specify the date of the application for the certificate.

2.6 In addition, relevant guidance in the National Planning Practice Guidance (“**the NPPG**”) states:

“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 probability”.

2.7 In determining the Application, the function of the Local Planning Authority is to decide whether the submitted evidence confirms that the existing use of the Property in breach of the Planning Condition is immune from enforcement action and therefore lawful within the meaning of the 1990 Act, and not to consider or decide upon the appropriateness of such use. Again, the NPPG confirms this:

“A local planning authority needs to consider whether, on the facts of the case and relevant planning law, the specific matter is or would be lawful. Planning merits are not relevant at any stage in this particular application or appeal process”.

3. Evidence and analysis

3.1 The Application is accompanied by evidence in the form of two statutory declarations,¹ one from a director of KDA who has worked at the Property for in excess of ten years, and one from an individual whose services have been employed by KDA for in excess of ten years in relation to the IT software used in the till system and related databases. The evidence supplied is summarised below:

- Mr Tibble, who is a director of KDA and has worked at the Property since the business first began operating from there in 2013, has provided a statutory declaration in which he confirms that over 84% of his customers at the Property have been and are retail customers, not trade customers, and that has been the case for in excess of ten years. Mr Tibble’s declaration is accompanied by photographs and a recent business rates invoice which describes the Property as a retail warehouse. Mr Tibble has grown his business over a period of time approaching 25 years and is very familiar with how it has evolved.
- Mr Barnard confirms that his services have been engaged by KDA for many years. Mr Barnard’s statutory declaration sets out that he has detailed working knowledge of two of the computer systems KDA have used at the Property, having developed those systems himself, and has the requisite qualifications and experience to analyse data collected from another system used for a short period at the Property. Mr Barnard’s declaration is accompanied by a table which displays the numbers of the type of sales (i.e. sales to retail or trade customers) each year for a period in excess of 10 years, and also displays the information on a percentage basis.

3.2 The evidence submitted with the Application demonstrates that the vast majority of sales have been to retail customers and not trade customers, and further demonstrates that that has been the case for a period in excess of ten years.

¹ Statutory declarations comprise evidence in their own right; *F W Gabbittas v SSE and Newham LBC* [1985] JPL (630).

3.3 The breach of the Planning Condition is to be assessed on a year by year basis, as it seeks to control “*total annual retail sales*”. The Planning Condition has clearly been breached continuously; there have been no interruptions in continuity of the breach. For completeness however, the following case law provides guidance which confirms that pauses in continuity of a breach would not, in any event, prevent immunity accruing for the purposes of sections 171B(3) and 191(3) of the 1990 Act:

- The case of *Secretary of State for the Environment, Terry Holding v Thurrock Borough Council*² concerned an enforcement notice which had been served in respect of the alleged unauthorised use of land as an airfield and for storage of aircraft. In that case Lord Justice Schiemann stated:

“...an enforcement notice can lawfully be issued notwithstanding that at the moment of issue the activity objected to is not going on — because it is the week-end or the factory's summer holiday, for instance. The land would still be properly described as being used for the objectionable activity”.

- The case of *Basingstoke and Deane Borough Council v The Secretary of State for Communities and Local Government v Sir Thomas Stockdale*³ concerned a breach of condition which restricted occupation of a property to occupation by agricultural workers only. There was a break in the occupation of the property for approximately one year. That one-year period was not considered to be a break in continuation of the breach. It was stated:

“What has to be done is to look to see what have been the relevant activities over the 10-year period in relation to the building in question. To put it in the context of this case, has there been what could properly be regarded as a breach of the condition over the whole of that period, whether or not there was anyone in physical occupation during any particular part of that period? The answer to that, as it seems to me, is that where there has been a clear breach, in the sense of the use for other than an agricultural tenant, as was the case from 1993 onwards, a gap during which refurbishment took place, in order to make the dwelling more attractive for continuing breach, is a period during which the breach continued. It continued because the activities then being carried out in relation to it, whether marketing, whether sorting out the correct persons, or company, to do the work, whether doing the actual work itself, were all in furtherance of the breach of condition. Thus, as it seems to me, if enforcement action had been taken during the period

² [2002] EWCA Civ. 226

³ [2009] EWHC 1012 (Admin)

when the negotiations were being carried out for the refurbishment to be done, or while the refurbishment was being carried out, or while the property was being marketed, it would have succeeded because all would have been properly regarded as breaches of the condition, because that was the purpose behind the activities being carried out”.

- In *Heyworth v Snowdonia National Park Authority*⁴, a case relating to an application for a certificate of lawful development in relation to use of land for camping, it was suggested that a potential break of 11 weeks was “*insufficient duration to amount to a break of continuity*” and “*should not be treated as a material break in the continuity of the camping use*”.

3.4 The time period for taking enforcement action in respect of the use of the Property as a retail warehouse has expired by virtue of the fact the breach has been ongoing for in excess of ten years and there have been no interruptions in continuity of the breach.

4. Conclusion

4.1 The evidence in the Application confirms that the breach of the Planning Condition has continued in excess of ten years. In light of this, the Local Planning Authority is requested to grant a CLEUD which confirms that the following activity is lawful:

The use of the property at Unit 4, Fall Bank Industrial Estate, Dodworth, Barnsley S75 3LS as a retail warehouse being a retail club where goods are sold, or displayed for sale, only to persons who are members of that club, in breach of condition 5 attached to planning permission 2012/08512.

4.2 It is proposed that for the purposes of section 191(5) of the 1990 Act, the reasons for determining the above use of the property to be lawful should be specified as:

The time for taking enforcement action in respect of the use of the property as a retail warehouse in breach of condition 5 attached to planning permission 2012/08512 has expired.

4.3 If the Local Planning Authority proposes to issue a CLEUD which contains an alternative form of wording than that proposed in the Application, or considers that further information is required, then in

⁴ [2013] P.A.D. 56

accordance with the NPPG⁵ we would request that this is discussed and agreed with us on behalf of the applicant prior to the issuing of the decision.

Blacks Solicitors LLP

April 2024

⁵ <https://www.gov.uk/guidance/lawful-development-certificates>; Paragraph: 009 Reference ID: 17c-009-20140306