Appeal Decision

Inquiry held on 7 June 2012
Site visit made on 6 June 2012

by David Leeming

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

Decision date: 15 June 2012

Appeal Ref: APP/W1715/X/11/2166044
Units 1A and 1B, Bradbeers Retail Park, Tollbar Way, Hedge End, Southampton SO30 2QU

- 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 Ram Capital Ltd against the decision of Eastleigh Borough Council.
- The application Ref U/11/69785, dated 1 October 2011, was refused by notice dated 28 November 2011.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The proposed use for which a certificate of lawful use or development is sought is an open A1 use.

Decision

1. The appeal is dismissed.

Preliminary Matters

2. At the Inquiry the Council made an application for costs against the appellants. This application is the subject of a separate decision.

3. In the application and appeal form the proposed use is described as an open A1 use. In the Council’s notice of refusal it is described somewhat differently, namely as being for ‘the retail of non-condition 8 goods only (Use Class: A1)’. The reference to condition 8 relates to a planning permission dated 11 July 1989 (LPA ref: 28673/11). That planning permission was for ‘4 retail warehouses and restaurant (Amended Scheme)’. Condition 8 states: 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.

4. The precise wording of the certificate sought by the appellants was discussed at the inquiry and it was agreed that a fuller, alternative description would be: The retail sale of goods falling within Use Class A1 other than wholly or principally any of the following: DIY materials and building supplies, furniture and carpets, domestic electrical appliances, auto accessories, garden equipment and materials, boats. Given the agreement to this revised description, the appeal has been considered accordingly.
5. The appellants confirmed at the Inquiry that they were not seeking to establish a lawful use of Unit 1B for open retail sales through the passage of time. This was ground 3 in the grounds of appeal submitted by the appellants’ former agent.

Reasons

Introductory comments

6. Units 1A and 1B are separately occupied retail units created from the subdivision of one of the 4 retail warehouses approved by the 1989 planning permission. No separate planning permission was sought for this subdivision, reliance being placed on the ability to sub-divide in the absence of any condition on the planning permission preventing this.

7. The matter to be determined in this appeal is whether or not the proposed use of units 1A and 1B is permitted by condition 8 and is therefore lawful. In this context, there is common agreement that condition 8 continues to apply following the sub-division.

The use of the plural

8. The parties agree that the reference to ‘principal goods’ in condition 8 means that at least 51% of the goods sold should be goods listed in the condition. The main issue dividing the parties concerns the reference in the condition to ‘retail warehouses’. Does this mean that each warehouse must principally sell only those goods listed in the condition (the Council’s position)? Alternatively, does it mean that, provided the warehouses as a whole principally sell such goods, one or more of the ‘4 retail warehouses’ can wholly or principally sell other A1 goods and still comply with the terms of the condition (the appellant’s position)?

9. Albeit that the retail units are physically joined together, the 1989 planning permission was not for a single structure but, as noted above, for ‘4 retail warehouses’ (plus a restaurant). These are shown on the approved site layout plan No. 372/W/50A. The approved amended drawing showing a single undivided building (reference number 405/1?) is one for which the relevant illustrated details relate solely to planting proposals (landscaping).

10. Condition 8 explicitly states that it is ‘the retail warehouses’ to which the restriction it imposes applies. The common sense meaning is that this restriction applies to each of the warehouses rather than to the warehouses collectively. In the absence of any explicit collective reference, such as ‘the warehouses as a whole’, the use of the plural, rather than supporting the appellant’s interpretation, supports that of the Council.

A plain reading of the condition

11. The appellants claim that the Council’s interpretation requires the addition of the words ‘each of’ before the words ‘the retail warehouses’. They say that the Courts have ruled out inferring or implying of planning conditions, and that inferring terms not found in the particular condition amounts to the same thing. The issue at appeal concerns the interpretation of a condition, not implying an absent one. Although, in the appellant’s view, the condition is generally imprecise, they consider that it is not so imprecise that its meaning cannot be

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1 In Trustees of the Walton-on-Thames Charities v Walton and Weybridge UDC (1970) 21 P. & C.R. 411
determined. In so far as the words ‘each of’ are inferred, the Courts have confirmed that a duty is placed on the Inspector to interpret the condition so as to give it a sensible meaning if he can. From a plain reading of the condition, even without the ‘missing’ words, the common sense meaning can be discerned.

The ability to sub-divide without first requiring planning permission

12. The appellants contend that a reading of the permission which applies the use restriction to the original 4 warehouses would not accord with the in-built flexibility to sub-divide without the need for planning permission. In their view, the ability to do this underlines the need for a broad view to be taken on the ambit of the condition such that its purpose is maintained. In the appellant’s view it would be unnecessary to stipulate that every unit (be it 1, 4 or 8) should sell at least 51% of the goods listed in condition 8 when the overall floor space restriction achieves the overall cap of 49%. Since conditions are only imposed when necessary they consider that this strongly indicates that their view of condition 8 is preferable to that of the Council.

13. However, it firstly needs to be noted that the condition does not specify the ‘principal goods’ percentage by reference to floor space. In this respect, as noted in an Opinion given by C. Lockhart-Mummery QC, condition 8 is imprecise on this matter.\(^2\) It would be just as appropriate to measure performance with the condition by way of turnover as it would be to do so by floor space.

14. Even if measurement of floor space is the most appropriate way to monitor compliance, the fact that re-configuration/sub-division of the warehouses could take place without any further permission, so as to create more or fewer individual units, does not materially assist the appellant’s case in establishing that the proposed use would be lawful. The ability to re-configure/sub-divide the warehouses (which was not restricted by condition) is a separate matter to the retail sales in the warehouses (which was subject to restriction by condition). As found above, the restriction in the condition applies to each warehouse. Having regard to the introductory comments above, this common sense interpretation of its meaning can equally be relied upon in relation to each retail unit following sub-division or amalgamation.

The purpose of the condition

15. The appellants refer to the judgement in \textit{R v Ashford BC Ex parte Shepway DC [1988] PCLR 12} which affirms that account may be taken of the express reasons given for a condition, since, as noted previously, conditions are not imposed unless they are necessary for the grant of the permission in question.

16. The condition was imposed to protect the viability of local shopping centres as a whole. From the terms of the condition, this is evidently because the Council considered that the prevention of an open A1 use in any of the units was necessary to meet its purpose.

17. However the appeal does not concern planning merits. It is not therefore necessary or appropriate in the context of this appeal to consider the appellant’s contention that the proposed use would be no more harmful, and

\(^2\) When giving advice as to the range of goods that can lawfully be sold from the Retail Park (Opinion dated 27 June 2007 – Appendix 7 to Mr Hind’s Proof of Evidence)
arguably less so, to the vitality of local shopping centres than the permitted use of each unit for 49% of sales of goods other than those listed in the condition.

**Conclusion**

18. For the reasons given above the Council’s refusal to grant a certificate of lawful use or development in respect of the proposed use of Units 1A and 1B, Bradbeers Retail Park was well-founded. In accordance with the power available in section 195(3) of the 1990 Act as amended the appeal is being dismissed.

*David Leeming*

INSPECTOR
APPEARANCES

For the Appellants
Rupert Warren QC, instructed by the appellants.
He called:
Jeremy Hinds, Savills Commercial Ltd

For the Council
Jeremy Burns of Counsel, instructed by Eastleigh BC.

DOCUMENTS
Doc. 1 – Outline of Appellant’s Submissions
Doc. 2 – The Local Planning Authority’s Submissions
Doc. 3 – The Local Planning Authority’s Legal Materials
Doc. 4 – A copy of the 1989 planning permission and related background papers (the application and plans etc)