Appeal Decision

Site visit made on 15 January 2016

by Julia Gregory  BSc (Hons) BTP MRTP MCMC
an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 18 March 2016

Appeal Ref: APP/W2465/X/15/3081127
Land to the rear of 39 Gwendolen Road, Leicester, LE5 5FL

• 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 Mr M Materia against the decision of Leicester City Council.
• The application Ref 20150493, dated 13 March 2015, was refused by notice dated 19 May 2015.
• The application was made under section 192(1)(b) 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 as removal of building materials and change of use of building and land from Use Class B1 to Use Class B8 for distribution centre for the purposes of storage and distribution of building materials up to 460 square metres (excluding plant & machinery) with a trade sales counter is lawful.

Decision

1. The appeal is dismissed.

Main Issue

2. Operations are lawful at any time if no enforcement action may be taken in respect of them; and they do not constitute a contravention of any requirements of any enforcement notice.

3. Having considered all the representations made in respect of the application for a certificate of proposed lawful use or development (LDC) that was made to the Council, the main issue is whether the proposed use is permitted development by virtue of the provisions of the Town and Country Planning (General Permitted Development) Order 1995 (as amended) (GPDO), schedule 2, part 3, Class B(b). This is the Order that was current at the time the application was made in March 2015.

Reasons

4. The premises comprise a building along with an area of forecourt. Although there is other land to the south east, that land is not within the application site. The trade sales counter would be accessed by a 3m x 2m internal waiting area.

5. There is no disagreement between the main parties that the lawful use of the site is use as a Class B1 (business) use as defined in the Use Classes Order 1987 (UCO) with no limitations by way of conditions restricting changes of use. There is no suggestion that the B1 (business) use has been abandoned. There
is also no suggestion that the Council has granted planning permission for the use the subject of the application.

6. The proposed development would comprise the making of a material change of use of the building and land and hence would fall within the meaning of development under s55(1) of the 1990 Act.

7. The Act provides a mechanism whereby the Secretary of State can grant planning permission for classes of development by means of a Development Order (sections 58, 59). The right to carry out development pursuant to planning permission granted by a Development Order is known as a permitted development right (PD).

8. The relevant Order is the GPDO. Schedule 2, part 3, Class B(b) permits the change of use of a building to use for any purpose falling within Class B8 (storage and distribution) of that Schedule from any use falling within Class B1 (business) or B2 (general industrial). At the time the application was made, there was a floorspace limitation of 500 sq m that the application proposal would not exceed.

9. The appellant says that the use proposed would fall within Use Class B8 of the UCO whereas the Council says that the use is sui generis. This is the main argument between the parties since if the use proposed comprises a B8 (storage and distribution) use then the change of use would be PD by virtue of the GPDO.

10. The use would comprise the storage and distribution of building materials and would cater for trade based custom and would not be aimed at the general retail market. The appellant says that a fork lift would be used on the site for loading for the purpose of distribution and there would not be any use of other plant and machinery that would be involved in an industrial or manufacturing process.

11. Stringent controls would be in place to prevent retail sales. This would comprise applications for credit accounts including the provision of company registration numbers. The trade sales counter would be accessed by a 3m by 2m internal waiting area, which would be some 1.3% of the total floor area according to the appellant. It would not be furnished with any display goods. The direct sales is estimated to be approximately 10% of overall sales with 90% of sales distributed direct to customers.

12. The Council granted a certificate of lawful use or development under s192 of the Act for use within Class B8 for the storage and distribution of building materials (235sqm)1. A note on the certificate stated that “the applicant is advised that sales of building materials from the site are not permitted and would require a formal application for planning permission. This certificate is issued on the basis, as confirmed by the applicant that there will be no use of plant or machinery on site.”

13. Furthermore, the Council granted a certificate of lawful use or development under s192 of the Act for use within Class B8 for the storage and distribution of building materials (460sqm) Class B82. A note on the certificate stated that “the applicant is advised that sales of building materials from the site are not

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1  20140039 dated 1 April 2014
2  20140689 dated 9 June 2014
permitted and would require a formal application for planning permission. This certificate is issued on the basis, as confirmed by the applicant that there will be no storage and distribution of plant or machinery on site and no visits by members of the public or trade.”

14. The distinction between this proposal and the second LDC application is in respect of the trade sales counter. The goods would be stored on site and sold to the trade direct via the trade sales counter. Although a small area of the building would be dedicated to the trade sales counter, this would be in an integrated fashion with items being stored in the main part of the storage facility for direct sale.

15. Building materials could thus be collected or distributed to the trade directly from site. This would be open to account holders only. Even if just involving sales to the trade that could generate significant vehicular comings and goings to the site which would have an effect on the overall character of the use. It is difficult to see what difference the customers having trade accounts would have compared to the impact of visits from customers in general.

16. Whilst the sales area would be small, and the percentage of the overall sales would only be 10%, there is no assessment made of what the quantity of direct sales transactions would be and how many visits this would represent. It could generate a significant amount of comings and goings. The sales element could generate additional vehicular and pedestrian traffic to the site from customers calling to order and purchase and collect goods, over and above a B8 storage and distribution use. Even if limited to only 10% of total sales the activity involved by incorporating a trade sales counter could be significant, altering the nature of the development from a Class B8 use, where such activity would not be expected, to a sui generis use.

17. The appellant has submitted various planning decisions from other authorities for B8 uses mainly where the appellant is Screwfix Direct Ltd. It is noticeable that there is no example submitted of a LDC for a similar proposal. That other Councils have granted planning permission for such uses that were previously in B1 use indicates that planning permission was required at the time determined. Three decisions make some reference to trade counters but I cannot be certain as to the similarities, including in scale, to the development proposed in this LDC.

18. I consider that the introduction of a trade sales counter along with the storage and distribution of building materials up to 460 square metres (excluding plant & machinery) would result in the operation of builders’ merchants. This would be sui generis and planning permission would be required.

19. Furthermore, it has not been demonstrated that no enforcement action could be taken in respect of the use. The Council took enforcement action in 2010 against the change of use of the property to a builders’ merchants with ancillary sales without planning permission. This was because the use was claimed to be having a significant detrimental effect on residential amenity of nearby dwellings by reason of general disturbance caused by noise, vibrations, dust and poor air quality. Also the Council alleged that the use compromised highway safety by an increase of traffic to a restricted site, parking demand and congestion in an area where on street parking is at a premium.

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3 Dated 18 March 2010
20. The site area in this application does not include all of the land referred to in the enforcement notice, and the proposed use would not include external storage. However, it seems to me that the sale of building materials direct to visitors would still substantially alter the nature of the business from Class B8.

21. It has not been demonstrated that it would not constitute a contravention of any requirements of an enforcement notice. The enforcement notice I have already referred to requires the cessation of the use of the premises as a builders’ merchants including ancillary sales.

22. For the reasons given above, I conclude that the Council’s refusal to grant a certificate of lawful use or development in respect of removal of building materials and change of use of building and land from Use Class B1 to Use Class B8 for distribution centre for the purposes of storage and distribution of building materials up to 460 square metres (excluding plant & machinery) with trade sales counter was well-founded and that the appeal should fail.

23. I will exercise accordingly the powers transferred to me in section 195(3) of the 1990 Act as amended.

*Julia Gregory*

Inspector