

SECTION '2' – Applications meriting special consideration

Application No : 17/02072/ELUD

Ward:
Penge And Cator

Address : Bronze Works Kangley Bridge Road Lower
Sydenham London SE26 5AY

OS Grid Ref: E: 536727 N: 171352

Applicant : Mr Dominic Hill

Objections : No

Description of Development:

Use of building as 8 no. flats (Class C3) pursuant to grant of prior approval under reference 13/03598. (LAWFUL DEVELOPMENT CERTIFICATE - EXISTING)

Key designations:

Biggin Hill Safeguarding Area
London City Airport Safeguarding
Smoke Control SCA 25

Proposal

The application is for a lawful development certificate for an existing use or operation or activity.

The existing situation is described on the application form (Q8) as "The former office block has been re-developed for 8 no. flats pursuant to the grant of prior approval permission ref. DC/13/03598/RESPA dated 10th December 2013".

Under Q9 the applicant states:

"The conversion of the former office block to 8 no. flats is development for which planning permission was granted under the GPDO pursuant to a valid prior approval application ref. DC/13/03598/RESPA."

The application is accompanied by:

- Site plan
 - Statutory declaration of Dominic and Nicholas Hill which can be summarised:
1. There was never any doubt in the mind of the applicants regarding the lawful status of the office block because it had been in continuous independent use for that purpose since the site was bought in August 2000.
 2. There was a lack of office requirements in the area and it had been a struggle to find reliable and financially viable tenants for the office building at the front of the site, as a consequence of which it was decided to apply for the change of use.
 3. The application was made on 15th October 2013 and at that time Ngwena Ltd was the tenant.
 4. The council issued its written notice of prior approval on 10th December 2013. The applicant's view of the lawful planning use status of the building was not questioned.

5. The applicants state that they have sought to rely on GPDO permission as prudent landowners/developers.
6. In early January 2014 the internal tear out of the offices began. At the same time the applicants started work with architects on the detailed building plans.
7. In March 2014 it was decided that a full planning application would be needed for other works associated with the change of use. Plans were drawn up and submitted on 17th June 2014. On 30th October 2014 a letter from the LPA was received which expressed doubts regarding the lawful use of the building on 30th May 2013 (the qualifying date).
8. A lawful development certificate was submitted and refused. In the interim the necessary conversion works have been undertaken to implement the change of use. As the GPDO originally stood there was a requirement to complete the change of use on or before 30th May 2016. On 6th April 2016 the GPDO was amended to extend the time limit for existing prior approvals to 3 years from the date of their grant.
9. As of 10th December 2016 the following works had been carried out:
 - Flat 1 completed and the current tenant moved in to occupy the unit on 28th May 2016 with a signed tenancy.
 - Flats 2, 3, 5 and 6 - completed apart from bathrooms
 - Flat 4 - mostly completed apart from kitchen/bathroom fittings
 - Flats 7 and 8 - partly completed, with wiring, plumbing and other structural works.
- Covering letter ref. BBG/HIL26-1 dated 5th May 2017 which provides a background to the submission of the current application, referring to the then on-going appeal and making the submission:
- The council is not legally able to set aside its prior determination that the Building was a B1(a) office.
- The current S191 application is for C3 dwellinghouse use of the individual units "in light of the fact that the prior approval permission has now been implemented by the carrying out of substantial conversion works to the Building."

The submission refers to there being two grounds (i) and (ii) to the s. 191 application.

(i) the grant of prior approval was a final determination of the B1(a) office use

(ii) the conversion works carried out at the building satisfy the timing requirements of the GPDO.

Additional information was submitted 17/7/17 and 2/8/17 comprising:

- Copy of "Agreement for an assured shorthold tenancy" between Mr D Hill/Mr N Hill and Mr Jaroslaw Rusiecki (tenant). The document starts on P4 of 22 pages and relates to The Bronze Works Flat 1. The date of the 6 month tenancy starting is given as the 27th May 2016 and the end date is the 26th November 2016.
- Pages 1 - 4 arrived separately and comprise "Prescribed Information" relating to the deposit protection service. Again, signed by the tenant and this document is dated 27/5/16.

- A domestic electrical installation certificate (No. 28971819) dated 28/5/16. The work is described as "full wiring of new 1 bedroom ground floor flat."
- Photographs of pipework and meter and note "The electric and gas supplies were taken from existing commercial supplies temporarily until the new supplies were installed. These are now installed. However, Flat 1 is still connected to the commercial supplies at this time. It is separately metered so that we know what is being used though this has not been charged to the tenant. If you would like to see this in person, please email us to arrange another site visit. Please find attached below images to support this fact."
- Notes from the applicant: page1 states that they were only aware that street naming/numbering department exists as a result of comment by planning appeal officer. The note states that they will be submitting the forms shortly. In the past, on the commercial side they have always just advised the VOA of the split and the new units were created and the relevant rates bills issued. The VOA were contacted by email dated 26/6/17 and 2 phone calls were made to follow this up.
- Copy of email to Hazel Jada (VOA.gsi.gov.uk) dated 20/6/16 stating "one of the flats has been completed and was passed to a new tenant on 27/05/2016. It is a one bedroom flat."
- Note (ATT0005) states Mr Fergus Powell from the VOA contacted Mr Hill in January 2017.
- Copy of email from Mr Fergus Powell (26/1/17) which refers to an email sent to Ms Jada in February 2015, and asks for an update. It asks if Mr Hill could let him know if they now have planning permission and if so whether the building works are near completion.
- Copy of email from Mr D Hill to Fergus Powell dated 9th February 2017 which states that Ms Jada had been told that one of the units had been completed and occupied. The remaining 7 units are referred to as being underway and at different stages of completion and expected to be completed in around 2 - 3 months.
- Copy of email from Mr Hill to Mr Powell dated 13/3/17 stating that the address of the unit is "Flat 1, Office Building, The Bronze Works". It refers to Mr Hill as being on site most of the time completing the other units.
- Copy of an email with a plan of the Flat 1, Bronze Works unit which was provided to CTSouth@bromley.gov.uk on 30/3/17.
- Copy of email from Mr Hill to CTSouth stating that the property became available on 27/5/16 and was rented from that date by Mr Rusiecki.
- Copy of an email from Mr Powell to Mr Hill dated 30/6/17 requesting that he let that office know if the remaining 7 units are complete and asking whether Mr Hill or the tenant have received a demand for council tax since the identification of the unit has been difficult, seeking the address "as it's known by the local authority."
- Witness statement of the applicant's legal representative on behalf of the applicants.

The statement includes the assertion that the witness wrote to the applicants on 5/4/16, 7/4/16 and 6/5/16 referring to changes in the GPDO and stressing the need for caution in relation to what works might need to be carried out and by what date, in order to save the "Permission" from expiring. The second of these letters referred to an email received by the witness on 6th April 2016 from the Planning Manager for DCLG. The email is quoted in the witness statement and refers to Section 17(2)(b) of the Interpretation Act 1978 and states inter alia "We consider that prior approval granted under the Class O before 6 April will continue (sic) to have effect under Class O as re-enacted, and will be subject to the new requirement that change of use be completed within three years starting with the prior approval date." The email quoted by the witness also states that "these amendments do not have retrospective effect in that they do not change the terms of any prior approval which has already been granted by the local authority (for example the new requirement to consider noise will not apply to prior approvals already granted)."

The witness (Mr Garbett) states it is the Government's own view that the change of use authorised by "this Permission" would need to have been completed by 10th December 2016 in this case.

At paragraph 13 the witness states that he has a record of a telephone conversation with the clients on 9 June 2016 in which he was informed that one unit had already been developed but there was no building regulations sign off for this flat.

With regards to completion, the witness refers to case law (SSCLG v Welwyn Hatfield BC [2011] UKSC 15) which endorsed a ruling of Lord Justice Donaldson in the case of Impey v Secretary of State. The witness refers to there being "no legal requirement to actually complete one or more units in order to 'begin' the use of the Building as a dwellinghouse, or to 'complete' the development (i.e. to initiate the permitted change of use)."

He concludes to state that the works that were undertaken in relation to the stripping out of the former office building and completion of flat 1 (and to varying degrees the conversion of the 7 other flats) were significant in planning terms to satisfy the GPDO requirement. He states that even if 10th December 2016 was treated as the relevant cut-off, this breach of Condition 0.2(2) of the GPDO does not render the start of development as being unlawful, giving rise simply to the question of whether it would be expedient for the Council to take enforcement action against that breach.

Consultations

Nearby owners/occupiers were notified of the application and no representations were received.

Legal Opinion

It is likely that the applicant is correct as to the lawful interpretation of the old Class J (now Class O) provisions. It makes sense that for a RESPA approval that straddles the 1995 and 2015 GPDO that once the 1995 version was repealed the rights under the prior approval were governed by the 2015 GPDO as amended. As a consequence following the repeal of the 1995 GPDO and the enactment of the 2015 GPDO, Class O.2(2) is the time constraint condition relevant, in which case the prior approval granted on 10 December 2013 had to be completed within 3 years.

The only issue therefore is whether the change of use was completed by that date.

The GPDO applies to parts of a building and not just the building as a whole (article 2(1) GPDO 2015 at "building" and case law relating to s.171B). As such the material change of use to a self-contained residential dwelling is an issue for each individual flat and not the

building as a whole as each individual flat is a separate planning unit once completed and the use implemented. The intention of the old Class J was to allow offices to be converted into multiple flats (and so a change of use for each individually) but each would still have had to have the material change of use completed within the meaning of Welwyn Hatfield.

It may be argued by the applicant that the use of the whole building changed to residential upon Flat 1 being occupied, and that then creating self-contained flats did not amount to a material change of use, but it seems inarguable that each flat, once completed and occupied, is a separate planning unit. 'Completion' of a change of use is a matter of fact and degree as to when the property was 'useable' for residential purposes.

Impey said: "Change of use to residential development can take place before the premises are used in the ordinary and accepted sense of the word, and [counsel] gives by way of example cases where operations are undertaken to convert premises for residential use and they are then put on the market as being available for letting. Nobody is using those premises in the ordinary connotation of the term, because they are empty, but there has plainly, on those facts, been a change of use. The question arises as to how much earlier there can be a change of use. Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. It may well be that during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree."

In addition to this extract from Donaldson LJ in the Impey case, the Judge also said "I would say that the physical state of these premises is very important, but not decisive. Actual use or intended use is important but not decisive. These matters have to be looked at in the round".

On the applicant's evidence as at 10 December 2016 only Flat 1 was 'useable' for residential purposes. Flats 2, 3, 5 and 6 had no bathrooms, Flat 4 had no kitchen or bathroom and Flats 7 & 8 were even less complete. The site was visited pursuant to the appeal into the previous application on 11th May 2017 and it was clear at that time that only Flat 1 was complete. Clearly the building as a whole was not useable for residential use on 10 December 2016. With the exception of Flat 1 none of the units had reached the point that it could be said that they were usable.

The key issue would be whether a change of use for each flat has occurred as a matter of fact and degree or not. On the applicants' own evidence none of flats 2 - 8 were useable for residential purposes by 10 December 2016.

As condition O.2(2) has not been satisfied there is no general permitted development right for the change of use to residential self-contained dwellings for those flats (2 - 8) so any change of use to residential self-contained dwellings for those flats on or after 10 December 2016 would be an unlawful change of use. Flat 1 will benefit from the permitted right to materially change the use as it was completed prior to 10 December 2016 and so is lawful as a separate planning unit.

It is noted that the applicant's agent agrees that the Impey case is the relevant authority, and while making an assertion that the GPDO requirements are met, it is also commented "In any event, even if 10th December 2016 is treated as the relevant cut-off date, this breach of condition (i.e. Condition O.2(2) of the 2015 GPDO) does not render the start of development as being unlawful. It merely gives rise to the question of whether it would be expedient for the Council to take enforcement action against that breach."

It is advised that the certificate application should be refused for the reasons above. However it is noted that the change of use on Flat 1 is lawful and those works on the remaining flats carried out prior to 10th December 2016 were not in breach of condition O.2(2) at the time they were undertaken.

Planning Considerations

Relevant Legislation

Class J, Part 3 to the second schedule to the Town and Country Planning (General Permitted Development) Order 1995 and its successor.

Class J, Part 3 to the second schedule to the Town and Country Planning (General Permitted Development) Order 1995 and the succeeding provision, Class O, Part 3, Schedule 2 to the Town and Country Planning (General Permitted Development)(England) Order 2015 grants permitted development rights to make a change from offices to dwellinghouses, subject to conditions. Condition O2(2) to Class O of the 2015 Order provides "Development under Class O is permitted subject to the condition that it must be completed within a period of 3 years starting with the prior approval date. The prior approval date is the date of the prior approval which is 10th December 2013.

The applicant has also referred to planning case law.

Planning History

13/03598/RESPA - On 10th December 2013 the Local Planning Authority granted prior approval for the change of use of premises from Class B1(a) office to Class C3 dwellinghouses to form 2 one bedroom, 4 two bedroom and 2 two/three bedroom flats. This was a 56 day application for prior approval in respect of transport and highways, contamination and flooding risks under Class J Part 3 of the Town and Country Planning of the Town and Country Planning (General Permitted Development)(Amendment)(England) Order 2013, with Section N of the Order providing the framework for determination.

14/02347/FULL1 - Under reference 14/02347 a planning application was submitted to the Council for the extension and elevational alterations to the office. During the course of this application (which was subsequently withdrawn) it was brought to the applicant's attention that the Council was doubtful as to the lawful use of the building on 30th May 2013 and whether that use fell within Class B1(a) as per the prior approval application.

15/05049/ELUD - Under reference 15/05049 an application for a lawful use/development certificate was submitted which sought to establish that the offices at the Bronze Works were non-ancillary and self-contained offices falling within Class B1(a). The application was described by the applicants thus:

"This application is to certify that the office block is B1(a) use and not ancillary to a wider commercial use on the site. The site apart from the office block is made up of 15 separate commercial units, all of which have tenants."

The application was submitted on 19th November 2015. The chronology submitted by the same applicants in this current application states that at this stage the tear out works of the office block had begun (para. 7 of statutory declaration dated 28th April 2017).

The application was reported by the Chief Planner to the Plans Sub-Committee meeting on 14th July 2016 where members refused the lawful development certificate on the grounds:

"Insufficient evidence has been provided to substantiate that the use of the front building would fall within Class B1(a) use and would not form part of a wider commercial use on the site. Insufficient evidence has been submitted to substantiate that the front building has been used as such continuously for a period of 10 years and as such the existing use is not considered to be lawful." The decision was dated 15th July 2016.

An appeal against the Council's refusal of the lawful development certificate has been allowed, with the Inspector certifying on the basis of the submissions that the use of the property on application date of 16th November 2015 fell within Class B1(a) of the Use Classes Order 1987 as amended.

Conclusions

The application seeks a Lawful Development Certificate for an existing use/building works/activity described in the application forms as "The former office block has been re-developed for 8 no. flats pursuant to the grant of prior approval permission ref: DC/13/3598/RESPA dated 10th December 2013."

The advice of the Director of Corporate Services is that in order for the proposal to be considered permitted under the provisions of Class O of the GPDO it would have to have been completed by 10th December 2016 (i.e. within 3 years starting with the prior approval granted on 10th December 2013).

Therefore the only issue in the assessment of this Lawful Development Certificate application is whether the change of use allowed by Class J and subsequently Class O was completed by 10th December 2016.

It is noted that the GPDO applies to 'parts' of a building and not just the building as a whole. The material change of use to a self-contained residential dwelling is an issue for each individual flat and not the building as a whole. Each individual flat comprises a separate planning unit once completed and the use implemented.

The key issue is whether a change of use for each flat has occurred. It is clear from the Impey case law that change of use to residential development can be judged to have taken place before the premises are used in the accepted sense of the word, where the residential accommodation is unoccupied for example.

The Court of Appeal said ""Change of use to residential development can take place before the premises are used in the ordinary and accepted sense of the word, and [counsel] gives by way of example cases where operations are undertaken to convert premises for residential use and they are then put on the market as being available for letting. Nobody is using those premises in the ordinary connotation of the term, because they are empty, but there has plainly, on those facts, been a change of use. The question arises as to how much earlier there can be a change of use. Before the operations have been begun to convert to residential accommodation plainly there has been no change of use, assuming that the premises are not in the ordinary sense of the word being used for residential purposes. It may well be that during the course of the operations the premises will be wholly unusable for residential purposes. It may be that the test is whether they are usable, but it is a question of fact and degree.....I would say that the physical state of these premises is very important, but not decisive. Actual use or intended use is important but not decisive. These matters have to be looked at in the round."

The information submitted by the applicant shows that the flats were in a varying state of development by the 10th December 2016 and the submission acknowledges that only one of the flats (Flat 1) was occupied at that time. Of the remaining flats, Nos. 2, 3, 5 and 6 had no bathrooms, Flat 4 was mostly completed with the exception of kitchen and bathroom

fittings and Flats 7 and 8 were only partly completed with wiring, plumbing and other structural works.

It is not considered on the basis of the applicant's own submission as part of this application and that submitted during the appeal into the previous application that the condition O.2(2) has been fully complied with in that Flats 2 - 8 were not useable on the relevant date for residential purposes. Only Flat 1 was usable for residential purposes.

Members are advised that this is a complex case, evidenced by the extensive planning history, and may be sympathetic to the position that the applicants find themselves in at this time in terms of the works done thus far. It is noted that the works to the remaining flats carried out prior to the relevant date were not in breach of condition O.2(2) at the time they were undertaken, but that works subsequent to that date would breach condition O.2(2).

However, as an application testing the lawfulness of the development it falls only to consider whether the development the subject of the application and referred to by the applicants in the first paragraph above is lawful as a matter of fact and degree. In view of the information provided by the applicant, their agent, from observation during the course of the previous appeal, and the legal advice provided to the council it is not considered that the proposal as it stands would be lawful and it is therefore recommended that the application for a Lawful Development Certificate for the use of the building as 8 flats (existing) be refused. It is open to the applicant to submit an application for planning permission.

as amended by documents received on 17.07.2017

RECOMMENDATION: REFUSE CERTIFICATE FOR EXISTING USE/DEVELOPMENT

for the following reasons:

- 1 On the balance of probabilities and in the absence of evidence to suggest otherwise, the conversion of the front building to 8 no. flats was not completed by 10th December 2016 and would therefore not comply with condition O.2(2) of Class O to the Town and Country Planning (General Permitted Development)(England) Order, 2015.**