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# Appeal Decision

by **H Davies MSc MRTPI**

an Inspector appointed by the Secretary of State

**Decision date: 4 April 2024**

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**Appeal Ref: APP/B1605/X/23/3331957**

**Eagle Star Tower, Montpellier Drive, Cheltenham GL50 1TA**

- The appeal is made under section 195 of the Town and Country Planning Act 1990 as amended (the Act) against a refusal to grant a certificate of lawful use or development.
  - The appeal is made by Eagle Strategic Property Ltd against the decision of Cheltenham Borough Council.
  - The application ref 23/01347/CLPUD, dated 3 August 2023, was refused by notice dated 26 September 2023.
  - The application was made under section 192(1)(a) of the Act.
  - The development for which a certificate of lawful use or development is sought is confirmation that work undertaken under prior approval ref 15/001237/P3JPA enables further change of use of building from office to residential.
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## Decision

1. The appeal is dismissed.

## Preliminary Matters

2. The application subject to this appeal sought a certificate of lawful use or development (LDC) for a proposed development. The onus is on the appellant to make their case to the standard of the balance of probabilities, or whether something is more likely than not. Issues of planning merit are not relevant.
3. Application reference 15/001237/P3JPA, registered on 11<sup>th</sup> July 2015, was a prior approval application for Eagle Star Tower in relation to a change of use of the upper floors (floors 1-12) from offices (Use Class B1) to residential (Use Class C3) to provide 96 apartments. The decision of the Council, on 24<sup>th</sup> August 2015, was that prior approval was not required.
4. As of 15<sup>th</sup> April 2015, the Town and Country Planning General Permitted Development Order 1995, as amended (1995 GPDO) was revoked and replaced by the Town and Country Planning (General Permitted Development) (England) Order 2015 (2015 GPDO). Under the original 2015 GPDO, Schedule 2, Part 3, Class O, granted permitted development rights for development consisting of a change of use of a building and any land within its curtilage from a use falling within Class B1(a) (offices) of the Schedule to the Use Classes Order, to a use falling within Class C3 (dwellinghouses) of that Schedule. A condition specified that development is not permitted by Class O where the use as dwellinghouses was "begun after 30th May 2016". Class O of the original 2015 GPDO re-enacted this permitted development right from the revoked 1995 GPDO, where it was set out under Schedule 2, Part 3, Class J. Other than the change of letter (from J to O), the permitted development right, requirements and conditions were re-enacted without amendment. Under both Class J of the 1995 GPDO and its successor Class O of the original 2015 GPDO a determination was required as to whether prior approval was needed.

5. Given the dates set out above, when application 15/001237/P3JPA was submitted and decided, the relevant order was the original 2015 GPDO. However, the decision notice incorrectly references Class J of the 1995 GPDO. Despite this, the officer report correctly references Class O of the 2015 GPDO. In addition, the covering letter with the application correctly refers to Class O. I therefore assume that reference to the 1995 GPDO and Class J in the decision notice for application 15/001237/P3JPA was a simple mistake. As the requirements and conditions did not change between Class J of the 1995 GPDO and Class O of the original 2015 GPDO, this matter does not have a material impact on the decision which was made. In assessing the matters for consideration under this appeal, I have proceeded on the basis that application 15/001237/P3JPA confirmed that prior approval was not required for the proposed change of use, on the basis of Class O of the 2015 GPDO.
6. Section 56 of the Act concerns "Time when development begun". It specifies that "(1)...development of land shall be taken to be initiated, (a) if the development consists of the carrying out of operations, at the time when those operations are begun; (b) if the development consists of a change in use, at the time when the new use is instituted". From the evidence presented to me, this case relates only to a change of use, and not the carrying out of operations. Therefore, in accordance with s56(1)(b), for this case, the development is 'begun' when the change of use is 'instituted'.

### **Main Issue**

7. The main issue is whether the Council's decision to refuse to grant an LDC for the proposed use was well founded.

### **Reasons**

8. The parties agree that under application 15/001237/P3JPA, 1 flat (referred to as Flat 41) had been created, made available and occupied for residential purposes since May 2016, so is lawful. I note the date of the building regulations certificate for Flat 41 is 31<sup>st</sup> May 2016. However, in accordance with relevant case law<sup>1</sup>, on the evidence available to me, I conclude that the use of Flat 41 as a dwelling should be considered to have been instituted on or before 30<sup>th</sup> May 2016. I therefore agree with the parties that Flat 41 is lawful. Notwithstanding this, it remains to be determined whether instituting Flat 41, in accordance with prior approval 15/01237/P3JPA, enables further change of use from offices to residential to lawfully continue.
9. The original 2015 GPDO was subsequently amended, with Class O being re-enacted with modification. From April 2016 the Class O requirement for the change of use to have "begun before 30<sup>th</sup> May 2016" was repealed. A new condition was added, requiring development permitted under Class O to be "completed within a period of three years" from the prior approval date.
10. Section 17(2)(b) of the Interpretation Act 1978 provides that where an Act repeals and re-enacts, with or without modification, a previous enactment then, in so far as any subordinate legislation made or other thing done under the enactment so repealed, or having effect as if so made or done, could have been made or done under the provision re-enacted, it shall have effect as if made or done under that provision.

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<sup>1</sup> Including *Impey v SSE & Lake District SPB* [1981] JPL 363; [1984] P&CR 157, and *Welwyn Hatfield BC v SSCLG & Beesley* [2011] UKSC 15; [2011] JPL 1183.

11. In this case, that means that in so far as anything done under the original Class O (i.e. confirming under application 15/001237/P3JPA that prior approval was not required for changing use of the building from offices to dwellings) could have been done under Class O as re-enacted with modifications, then that thing shall have effect as if done under Class O as re-enacted with modifications.
12. In my view therefore, prior approval granted (or confirmation provided that prior approval was not required) under Class O before 6 April 2016, should be treated as having been granted under Class O as re-enacted in the amended 2015 GPDO, and is subject to the conditions of the re-enacted Class O. In other words, such prior approval cases are no longer subject to the 30<sup>th</sup> May 2016 deadline to have "begun" but are subject to the 3-year time limit to be "completed", which replaced that deadline. In the case subject to this appeal, the time limit would have run out 3 years from the decision date of 24<sup>th</sup> August 2015 (ie 23<sup>rd</sup> August 2018).
13. The appellant has confirmed that the site subject to the appeal is currently used for offices, other than Flat 41 on the 4<sup>th</sup> floor. At the time of the LDC application, Flat 41 had been in use as a dwelling for more than 7 years, while the rest of the site covered by 15/01237/P3JPA remained in use as offices. On this basis, I consider Flat 41 to be a separate planning unit, which, as set out above, has a lawful use as a dwelling. The change of use of the rest of the site covered by 15/01237/P3JPA has not been instituted and the lawful use remains as offices.
14. In addition, instituting 1 dwelling unit out of a proposed 96, on 1 floor from a proposed 12, is a very small proportion. As a simple matter of fact and degree, I do not consider this small proportion can be considered as instituting the change of use of the whole building.

### **Conclusion**

15. On balance, I conclude that prior approval granted under 15/01237/P3JPA does not enable further change of use from office to residential within Eagle Star Tower. Consequently, the Council's decision to refuse to grant a certificate of lawful use or development was well founded and the appeal fails. I will exercise accordingly the powers transferred to me in section 193(3) of the 1990 Act as amended.

*H Davies*

INSPECTOR