Directorate for Planning and Environmental Appeals

Appeal Decision Notice

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The Scottish Government

- Decision by R F Loughridge, a Reporter appointed by Scottish Ministers
- Certificate of lawful use reference: CLUD-270-2002
- Site address: Units 1A-8 at Phase 1 Inverness Retail Park, Eastfield Way, Inverness IV2 7GD
- Appeal by the Trustees of Hercules Unit Trust Ltd against the decision by The Highland Council
- Application for certificate of lawful use 12/03814/CLP dated 24 September 2012 refused by notice dated 28 March 2013
- The subject of the application: a certificate to the effect that the use of specified units at Inverness Retail Park for the sale of all retail goods including food would be lawful

Date of appeal decision: 30 September 2013

Decision

I dismiss the appeal and refuse to grant the certificate in the terms for which the application was made.

Reasoning

1. The determining issue in this appeal is whether, having regard to the terms of permission IN/1995/833, the sale of food at the specified units would be lawful. This centres on the proper interpretation of the planning history of the site. The description of the proposed use of the buildings in the relevant certificate of lawful use or development application form is as follows:

> With the exception of the floorspace at mezzanine level within units 4, 6 and 7 (approved under permission 03/1268/FULIN, 05/00008/FULIN and 05/00806/FULIN) Units 1A to 8 comprising phase 1 of Inverness Retail Park can be used for the sale of all retail goods including food within class 1 of the Schedule attached (sic) to the Town and Country Planning (Use Classes) (Scotland) Order 1997 as amended.

The Council refused the certificate requested because the use would be in breach of the terms of planning permission IN/1995/833.

2. The planning history is not substantially disputed. It appears to begin with the grant of permission (IN/1995/833) on 15 February 1996 for the erection of a non-food retail park, the

terms of which are critical to the parties' submissions. I note that the description originating in the application form is repeated in the eventual decision notice. The development is consistently described as the "erection of a non-food retail park, indoor leisure complex and business park (Class IV)…" and that the permission granted is stated to be "…for the said development in accordance with the plans…and the particulars given in the application…". Moreover, the relevant permission has attached to it, as condition 1, the following:

> Permission is hereby granted for non-food Class 1 retail development not exceeding 10,695 square metres of gross floorspace.

The reason for that condition is stated expressly to be for the purpose of clarifying the terms of the permission granted. There is thus, in my view, no ambiguity or doubt about the proposal being explicitly one which did not involve the food sales.

3. The decision was followed by sundry subordinate approvals as detailed in the schedule submitted by the planning authority. The approval of reserved matters (IN/1996/809) in November 1996 reiterated this unambiguous approach; and the permission was in due course implemented. The maximum floorspace limit, however, was increased to 10,828 square metres as a non-material variation by letter dated 18 May 2000. I understand this was to regularise what was in fact constructed, which was not quite the floorspace the original consent would have allowed.

4. Subsequent grants of permission, beginning in August 2002, in respect of individual retail units within the retail park, have variously permitted the subdivision of units, the creation of mezzanine floors within some units, the sale of hot food in specified locations, and external alterations to some units.

5. It is the Council's contention that the proper construction of the planning permission IN/1995/833 for the retail park means that the sale of food within the units identified would amount to a material change of use requiring planning permission to be lawful. It is the appellants' view that the apparent restriction on the sale of food is unenforceable. In particular, the permission as granted, it is claimed, does not provide the essential requirement that only a specified range of goods may be sold, and no other. In addition it does not exclude the benefit of the Use Classes Order. Accordingly, the sale of food within the retail park is permissible, in the appellants' view, without further permission; and it would not be open to the Council to issue enforcement proceedings to prevent such sales.

6. I deal first with the appellants' contention that the 1996 permission does not effectively preclude the lawful sale of food items within the retail park, on the basis that the wording of what is described as condition 1 does no more than recite the terms of the permission itself; and that the legal effect thereof is that permission is being granted for Class 1 retail development, subject to a "purported limitation" that it be for non-food. Such a limitation is, however, according to the appellants, not a planning condition and cannot be enforced under the Town and Country Planning legislation. In this connexion, I was referred by the appellants to the English decision of *I'm Your Man Ltd –v- Secretary of State for the Environment* (1999) 77 P&CR 251.

7. I reject this argument as ill-founded. It seems to me that where, as here, the development proposed when permission was originally sought and granted was expressly

one for a non-food retail park, albeit including other uses, the wording used is apt to preclude the sale of food except with a further grant of appropriate permission. While condition 1 could have been better worded, it nonetheless appears to me to meet the legal requirements for an enforceable condition adjected to a planning permission. That appears to me to be the only sensible reading of the permission, taking it as a whole. I do not accept that condition 1 does no more than repeat the terms of the permission; and I am fortified in this analysis by reference to the stated reason for the condition, namely that it was to clarify the terms of the permission granted. It thus appears to me that the present case is altogether different from the circumstances in *I'm Your Man*, which was concerned with a permission granted for a development for a period of time specified in the application form and in the consent eventually given on appeal, but without a condition specifying that the use permitted was to cease at the end of the specified period. Here there is an unambiguous condition clarifying that the sale of food is excluded from the range of goods that may otherwise be sold by retail.

8. The appellants' second contention is that, in any event, there was no express exclusion of the operation of the Use Classes Order, without which they are entitled to invoke its terms to allow the sale of food. The units within the retail park are undoubtedly shops of Class 1; and class 1 routinely involves use for the retail sale of goods other than hot food. Where as a general principle a planning authority intends to exclude the operation of the Use Classes Order (or any other piece of subordinate legislation) the appellants contend that the authority should do so by the imposition of a condition in unequivocal terms.

9. Again I reject this argument as ill-founded, if it is intended to suggest that what was stated here was equivocal. It is in my view entirely proper to construe the permission in this case as sufficient to exclude the operation of the Use Classes Order or any other piece of subordinate legislation which would otherwise operate to permit such a change to take place. I do not accept that it is necessary expressly to exclude the operation of the Use Classes Order or to make reference to a particular Order by name. There is no doubt in my mind that use of the term "non-food" makes it clear that the benefit of statutory provisions which would otherwise permit the inclusion of food in sales that might take place lawfully are not to apply. It is proper in my view to construe the permission as a whole, and to apply ordinary principles of construction of the English language. Taking that approach there is no doubt that the sale of food is not allowed as part of the permission.

10. Accordingly, I find that the Highland Council applied the correct test in arriving at the decision to refuse the certificate applied for in this case. I have taken into consideration all the other matters raised in the submissions before me but find nothing which leads me to a different conclusion.

R F Loughridge
Reporter