

Case Name: *RSBS Developments Ltd v Secretary of State for Housing, Communities And Local Government & Anor* [2020] EWHC 3077 (Admin) (17 November 2020)

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Commentary: This was an unsuccessful challenge to a refused appeal against an enforcement notice, a refused planning application for external alterations and a refused certificate of lawfulness application in respect of former offices which had been converted to residential flats in Wembley.

In August 2015 the claimant obtained prior approval to convert an office building into flats. In November 2015 the claimant obtained planning permission for a first-floor extension to an existing single-storey extension at the rear of the building for office use only. However, between December 2015 and February 2016 the existing extension was in fact demolished and replaced with a two-storey extension with a larger footprint. The conversion of the building from office to residential use therefore differed from the layout plans submitted with the prior approval application because two of the flats incorporated floorspace provided by the new two-storey extension.

After the council raised concerns, the claimant removed the second storey in December 2016 and reduced the ground floor to approximately its original size in June 2017, all without planning permission. The claimant then applied for retrospective planning permission for the remaining deviations which was refused in July 2017. In November 2017 the council refused a certificate of lawfulness for the residential use of four of the flats. In March 2019 the council issued an enforcement notice alleging breach of planning control by the unauthorised change of use of the premises to dwellings. The claimant challenged the planning inspector's decision to refuse its appeal against all three of these decisions in February 2020.

Article 3(5) of the GPDO provides that the permission granted by Schedule 2 of the GPDO does not apply if (a) in the case of permission granted in connection with an existing building, the building operations involved in the construction of that building are unlawful and (b) in the case of permission granted in connection with an existing use, that use is unlawful. The issue considered by the court was whether the inspector erred in her interpretation and application of article 3(5) which led to the conclusion that the grant of prior approval could not apply to the material change of use in 2016.

The claimant's first ground of challenge was that article 3(5) only applied before, and not after, the crystallisation of the permission by the grant of prior approval. However, the court considered that the principle of excluding permitted development rights where the 'host' development is unlawful was well-established and that the absence of lawful planning permission for the 'host' development is a matter of real significance. It was acknowledged that it was

unusual for the unlawful building works triggering article 3(5) to post-date the grant of prior approval, but it was held that that it would be contrary to the legislative purpose of article 3(5) to prevent its operation after the grant of prior approval.

The claimant's second ground was that Class O of the GPDO granted permission in connection with an existing use, not operational development, and therefore article 3(5)(b) applied rather than article 3(5)(a) and the two subparagraphs were mutually exclusive, or alternatively that article 3(5)(a) did not apply because the main premises in connection with which the permission was granted had a lawful office use. The court rejected the argument that the two subparagraphs of article 3(5) were mutually exclusive, and it decided that article 3(5)(a) did apply because the phrase "in connection with a building" is broad in its scope and could include permission for a change of use which was in connection with a building. It also applied *Evans v Secretary of State for Communities and Local Government* [2015] JPL 589 where it was held that "if the building operations involved in the construction of any part of [a] building are unlawful, the permitted development rights granted in connection with the existing building do not apply".

The final ground of challenge was that once the council's article 3(5) objection had been addressed, by reducing the size of the extension and applying for planning permission, the claimant should have been given the opportunity to regularise the position and obtain the benefit of the permitted development rights which had been suspended but not lost. The court agreed with the inspector that the claimant's measures to address the council's concerns did not implement the permission which crystallised with the grant of prior approval in 2015 thereby retrospectively rendering the material change of use of the premises as lawful permitted development.

Finally it was noted that the material change of use from office to residential was unlawful so even if the inspector had not found that article 3(5) was engaged, she would still have dismissed the appeals under section 174(2)(c) TCPA 1990 in any event.

Case summary prepared by Safiyah Islam