Appeal Ref: APP/Y0435/X/09/2103771
Plot 310, Crossley Drive, Magna Park, Milton Keynes

- 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 Fen Farm Developments Ltd against the decision of Milton Keynes Council.
- The application Ref 09/00259/CLUP, dated 17 February 2009, was refused by notice dated 17 April 2009.
- The application was made under section 192(1)(a) of the Town and Country Planning Act 1990 as amended.
- The use for which a certificate of lawful use or development is sought is use as a data centre.

Summary of Decision: The appeal is allowed and a certificate of lawful use or development is issued, in the terms set out below in the Formal Decision.

Main issue

1. The main issue is whether the use of the appeal site as a data centre would be lawful if instituted at the time of the application.

Reasons

2. The appeal site forms part of a much larger site, known as Magna Park, for which outline planning permission (Ref 04/01072/MKPCO) has been granted for the development of a “logistics/distribution and manufacturing facility with ancillary primary infrastructure” etc. This is a broad description and, in the Council’s delegated officer report concerning the application for a certificate of lawfulness, the Council accepted that this permission authorises Class B8 uses on the appeal site. Having regard to the description of the permitted use and the conditions attached to the outline permission, I am satisfied that this is the case. I note that a John Lewis Partnership distribution centre has already been constructed on the overall Magna Park site.

3. Use of the site as a data centre could not lawfully commence without compliance with the conditions on the outline permission, including submission of reserved matters. However, having regard to the judgement in Broads Authority v Secretary of State for The Environment Transport and the Regions and David Phillips Investments Limited (2001) 81 P & CR, this does not prevent the grant of a certificate. If the proposed data centre use would fall within Class B8 then, subject to the conditions on the outline permission, it would be lawful.
4. The appellant explains that a data centre is a facility operated by, or hosted on behalf of, a company to house a large computer installation storing vast quantities of back up data related to the company’s activities and customers’ accounts. They are normally operated by major financial institutions such as banks, but can serve multiple clients. The appellant further explains that data centre buildings have ancillary office content, like other B8 units, but are typically racked out to accommodate electronic data storage and handling systems. Given that the term data centre may not be universally understood, it would seem sensible to refer in any certificate of lawfulness to the storage of electronic data.

5. In the Schedule to the Town and Country Planning (Use Classes) Order 1987 (UCO), Class B8 encompasses “use for storage or as a distribution centre.” The word “storage” is not qualified by reference to goods, or in any other way. Electronic data has to be stored and the vast quantities generated by modern day commercial and government activity leads to a requirement for significant data storage space.

6. Data centres inevitably depend on the use of computerised electronic storage equipment, but this does not mean that the emphasis of the operation is on the use of computers. The purpose of the electronic equipment is the storage of data; that equipment is merely the storage and handling medium. The use of electronic equipment is no more the primary purpose of the facility than the use of racks and rails is the primary purpose of a traditional clothing warehouse.

7. The Council draws attention to paragraph 57 of Circular 03/2005. This explains that Class B8 should not be used for the classification of retail warehouses where the main purpose is “for the sale of goods direct to the public.” However, the fact that a specific use involving goods is excluded from Class B8 does not mean that all B8 uses must involve physical goods.

8. The parties agree that the words of the UCO should be interpreted literally and given their ordinary meaning. Data storage may be a relatively novel form of storage, but it is nevertheless storage. To interpret the word in this way results in no obvious absurdity, notwithstanding that vehicle movements and other activity associated with a data centre will be less than that generated by most conventional warehouse operations. Even with traditional warehouses, the level, type and impact of activity can vary considerably according to the nature of what is being stored. I am not aware of any case law qualifying the meaning of “storage” in the context of Class B8. It is not for me to qualify the plain words of the statutory instrument by assuming that goods are necessarily involved and I see no need to adopt a more purposive approach to the interpretation of the UCO. If any qualification were deemed necessary, that would be a matter for Parliament.

9. The Council refers to a decision of the London Borough of Ealing (Ref P/2008/1739) in which it was concluded that a data centre would not fall within Class B8. However, the London Borough of Kingston arrived at the opposite conclusion on another application (Ref 08/10204/FUL), referred to by the appellant. Whilst both decisions are material considerations, neither constitutes a binding authority and I have reached my own decision on the evidence before me. The Council also points out that the Land Use Gazetteer
does not classify data centres as B8, but it is not clear whether it mentions them at all and, again, I rely on my reasons set out above.

10. Paragraph 27 of Circular 03/2005 refers to sui generis uses and explains that the list of these in Article 3(6) of the UCO is not exhaustive: “many uses do not clearly fall within any use class and new types of use are constantly emerging. The Courts have held that it is not necessary to go to extreme lengths to identify a class for every use.” I have not had to go to extreme lengths to conclude that storage of electronic data is a storage use within Class B8.

11. On the basis of my finding that a data centre falls within Class B8, and having regard to all other matters raised, I conclude on the main issue that, subject to compliance with the conditions on the outline planning permission, the use of the appeal site as a data centre would be lawful if instituted at the time of the application. I therefore consider that the Council’s refusal was not well-founded and that a certificate of lawfulness should be granted.

Decision

12. I allow the appeal, and I attach to this decision a certificate of lawful use or development describing the proposed use which I consider to be lawful.

JA Murray

INSPECTOR
IT IS HEREBY CERTIFIED that on 17 February 2009 the use described in the First Schedule hereto in respect of the land specified in the Second Schedule hereto and hatched in black and marked as Plot 310 on the plan attached to this certificate, would have been lawful within the meaning of section 191 of the Town and Country Planning Act 1990 (as amended), for the following reason:

The proposed use of the land falls within Class B8 in the Schedule to the Town and Country Planning (Use Classes) Order 1987 and is therefore permitted by planning permission reference 04/01072/MKPCO, subject to the terms and conditions of that permission.

Signed

JA Murray
John Murray
Inspector

Date: 25.08.09

Reference: APP/Y0435/X/09/2103771

First Schedule

Use of the land as a data centre for the storage of electronic data, subject to the terms and conditions of the planning permission granted on 26 May 2006 under reference 04/01072/MKPCO.

Second Schedule

Land at Plot 310, Crossley Drive, Magna Park, Milton Keynes
NOTES

1. This certificate is issued solely for the purpose of Section 192 of the Town and Country Planning Act 1990 (as amended).

2. It certifies that the use described in the First Schedule taking place on the land specified in the Second Schedule would have been lawful, on the certified date and, thus, would not have been liable to enforcement action, under section 172 of the 1990 Act, on that date.

3. This certificate applies only to the extent of the use described in the First Schedule and to the land specified in the Second Schedule and identified on the attached plan. Any use which is materially different from that described, or which relates to any other land, may result in a breach of planning control which is liable to enforcement action by the local planning authority.

4. The effect of the certificate is subject to the provisions in section 192(4) of the 1990 Act, as amended, which state that the lawfulness of a specified use or operation is only conclusively presumed where there has been no material change, before the use is instituted or the operations begun, in any of the matters which were relevant to the decision about lawfulness.
Plan

This is the plan referred to in the Lawful Development Certificate dated: 25.08.09

by John Murray LLB, Dip.Plan.Env, DMS, Solicitor
Land at: Plot 310, Crossley Drive, Magna Park, Milton Keynes

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