Appeal Decision

Site visit made on 30 August 2016

by Alan Woolnough BA(Hons) DMS MRTPI

an Inspector appointed by the Secretary of State for Communities and Local Government

Decision date: 3 October 2016

Appeal Ref: APP/C5690/C/15/3140532
Ground floor, 15 Lee High Road, London SE13 5LD

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Sher Shah against an enforcement notice issued by the Council of the London Borough of Lewisham.
- The Council's reference is EN/14/00423.
- The notice was issued on 30 October 2015.
- The breach of planning control as alleged in the notice is: 'Without planning permission, the making of a material change of use of the ground floor of the premises
  From; Use Class A2 Financial and professional services Town & Country Planning (Use Classes) Order 1987 (as amended)
  To; Use as a mini-cab office; Sui generis use'.
- The requirement of the notice is: 'Cease the use of the ground floor of the premises as a mini-cab office'.
- The period for compliance with the requirement is three months.
- The appeal is proceeding on the grounds set out in section 174(2)(b), (c), (f) and (g) of the 1990 Act as amended. Since the prescribed fees have not been paid within the specified period, the initial appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended do not fall to be considered.

Summary of Decision: The appeal succeeds in part on ground (b) but is otherwise dismissed and the enforcement notice is upheld with corrections.

Procedural matters

1. I allowed the main parties a further period beyond my site visit in which to make written representations concerning any injustice that might arise from envisaged corrections to the enforcement notice. Only the Council responded by the relevant deadline and I have taken its comments into account in reaching my decision.

2. Much of the Appellant's submission focuses on the planning merits of allowing the subject use to continue with the benefit of planning permission. However, I am unable to have regard to such arguments in the absence of a valid appeal on ground (a).

The notice

3. At the time of my visit, signage and a window display at No 15 suggested that it was by then being used as premises for a business specialising in the unlocking and repair of mobile phones, computers and laptops and the sale of

accessories thereto, as well as functioning as a mini-cab office. A mixed use of this kind is not referred to in the enforcement notice or any subsequent submissions by either party. However, my decision may only address the situation as it was at the time that the notice was issued. Nothing before me suggests that the premises were used as anything other than a mini-cab office on 30 October 2015. I will therefore determine the appeal on that basis.

4. Notwithstanding the above, the notice is incorrectly framed in other respects. As issued it alleges a breach of planning control consisting of a material change of use under section 171A(1)(a) of the 1990 Act as amended. However, it is readily apparent from the Council's submissions on the appeal that the breach that has actually occurred is the continuation of a use after the planning permission from which it benefited, which was time limited by means of a condition, had expired.

5. The permission in question was granted by the Council on 6 January 2014, under ref no DC/13/85490, for development described as: 'The continued use of the ground floor at 15 Lee High Road SE13 as a Mini Cab Office (Sui Generis)'. Condition 3 reads: 'The use hereby permitted shall be discontinued after a period of eighteen months and the use of the premises shall revert to its previous authorised use on or before 3 July 2015'. On the evidence before me, the building floorspace targeted by the enforcement notice is broadly consistent with that subject to the permission.

6. The continuation of a use originally authorised by a planning permission granted for a limited period beyond the expiry of that period is not a change of use and not, in itself, development. The notice as issued is therefore incorrect and, to accurately reflect the breach that has occurred, should have alleged a failure to comply with a condition subject to which planning permission has been granted, under section 171A(1)(b) of the 1990 Act as amended. Having said this, I find that the notice is not beyond correction.

7. Although erroneously drafted, it did not leave the Appellant in any doubt as to what activity was being enforced against and it is clear that he was aware of the expired permission. Moreover, if the necessary correction were made, any deemed planning application under section 177(5) of the 1990 Act as amended, by analogy with section 73A(3)(b) and associated with any valid ground (a) appeal against the notice as issued, would have been for the development originally permitted but without condition 3, with effect from the day following the date when the limited period imposed by that condition expired.

8. In such circumstances, the planning considerations relating to the material change of use alleged in the notice as issued would not have differed in any way from those relevant to a breach of condition 3 of the 2014 permission had a valid appeal on ground (a) been pursued in either case. To correct the notice accordingly would not therefore be to deny the Appellant the opportunity to appeal on ground (a), or indeed any other ground, in a manner materially different to that which was already available to him when the notice was issued in its original form.

9. I will therefore correct the notice by making the following changes:
   - in the main heading of the notice at the top of the first page, the deletion of the words 'MATERIAL CHANGE OF USE';

- in section 1, the replacement of 'Section 171A(1)(a)' with 'section 171A(1)(b)'; and
- in section 3, the replacement of the text in its entirety, with the exception of the heading, with:
  'Retrospective planning permission was granted on 6 January 2014 for the material change of use of the ground floor to a mini-cab office under ref no DC/13/85490. Condition 3 of that permission reads: 'The use hereby permitted shall be discontinued after a period of eighteen months and the use of the premises shall revert to its previous authorised use on or before 3 July 2015'. This condition has not been complied with in that the mini-cab office use persists. Planning permission has not been renewed'.

10. These corrections do not address defects so fundamental that they result in a substantially different notice. Accordingly, there is no injustice to any party in making them.

The appeal on ground (b)

11. In appealing against the enforcement notice on ground (b), the onus of proof is firmly on the Appellant to demonstrate on the balance of probabilities that the matter stated in the notice had not occurred as a matter of fact at the time it was issued. The Appellant puts forward no evidence to this effect in the context of his ground (b) appeal, which is confined to matters that could only have been pursued on ground (a) had fees been paid and, to a more limited extent, ground (c).

12. Nonetheless, the Council has effectively done his job for him by confirming that a new material change of use had not occurred as a matter of fact, as described above. Correction of the notice as a result, in the manner I have set out, equates to partial success on ground (b). Nonetheless, it does not lead to the notice being quashed for the reasons I have already explained. This being so, I will move on to consider the other grounds of appeal.

The appeal on ground (c)

13. In appealing against the enforcement notice on ground (c), the onus of proof is firmly on the Appellant to demonstrate on the balance of probabilities that the matter stated in the notice as corrected did not amount to a breach of planning control at the time that the notice was issued. Again, the Appellant's case in this regard is confined largely to ground (a) matters. Beyond that, whilst he refers to planning permission having been granted previously for mini-cab office use there is nothing before me to suggest that this did not expire, at the very latest, on 6 July 2015[1] or has since been renewed.

14. In the absence of any evidence to the contrary I must conclude that continuation of the subject use beyond the terms of the most recent planning permission for it was, indisputably, a breach of planning control when the notice was issued. The appeal on ground (c) therefore fails.

[1] Condition 3 of planning permission ref no DC/13/85490 is ambiguous in that it requires the use in question to be discontinued after a period of 18 months (which, taken from the date of the permission, equates to 6 July 2015) and also to revert to a previous use on or before 3 July 2015. The discrepancy is immaterial as both dates precede the issuing of the enforcement notice by several months.

The appeal on ground (f)

15. In order to succeed on ground (f), the Appellant must show that the requirement of the enforcement notice exceeds what is necessary to remedy the breach of planning control and put forward alternatives that would achieve that statutory purpose. In the absence of a deemed planning application there is no scope for me to consider lesser remedial steps which might merely address harm to amenity arising from the breach.

16. The Appellant's suggestions under this heading, such as closing the doors of the office to customers and ensuring that vehicles are parked away from the premises, could have been properly addressed as potential conditions in the context of a ground (a) appeal. However, in the absence of this they go beyond what I am able to consider.

17. Although the Appellant indicates that he is open to ideas for alternative requirements, it is not within my remit to make such suggestions. Rather, ways in which this unlawful use might be rendered acceptable in planning terms fall to be discussed first and foremost with the Council. I therefore conclude on the evidence before me that the requirement set out in the notice is not excessive. Accordingly, the appeal on ground (f) fails.

The appeal on ground (g)

18. To succeed on ground (g) the Appellant must show that the three month period prescribed for compliance with the notice is too short and provide justification for its extension. In this regard he refers to financial investment associated with the undertaking and asserts that the lives of 25 to 30 families are connected to the unlawful use of the premises, such that hardship would arise should the business cease to operate.

19. However, no cogent evidence to support these claims has been provided, either in the form of financial statements or details of particular personal circumstances. Moreover, it has not been demonstrated that finding alternative lawful premises or employment would be likely to take longer than three months. Nor has a longer period for compliance been specified which the Appellant feels would be acceptable.

20. In the absence of any substantive case to the contrary I conclude that the period for compliance specified in the notice as issued is not too short and that the appeal on ground (g) should fail. It remains within the Council's power to further extend the period for compliance under section 173A(1)(b) of the 1990 Act as amended in the event that this proves to be necessary.

Conclusion

21. For the reasons given above I consider that the appeal should succeed in part on ground (b) but should otherwise fail. I will therefore uphold the enforcement notice with corrections.

Formal decision

22. It is directed that the enforcement notice be corrected by:
    (i) in the main heading at the top of the first page, the deletion of the words 'MATERIAL CHANGE OF USE';

(ii) in section 1, the replacement of 'Section 171A(1)(a)' with 'section 171A(1)(b)'; and

(iii) in section 3, the replacement of the text in its entirety, with the exception of the heading, with the words 'Retrospective planning permission was granted on 6 January 2014 for the material change of use of the ground floor to a mini-cab office under ref no DC/13/85490. Condition 3 of that permission reads: 'The use hereby permitted shall be discontinued after a period of eighteen months and the use of the premises shall revert to its previous authorised use on or before 3 July 2015'. This condition has not been complied with in that the mini-cab office use persists. Planning permission has not been renewed'.

23. Subject to these corrections, the appeal succeeds in part on ground (b) but is otherwise dismissed and the enforcement notice is upheld.

Alan Woolnough

INSPECTOR