
Appeal Decisions

Site visit made on 13 September 2016

by Jean Russell MA MRTPI

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

Decision date: 13 October 2016

Appeal A: APP/W4705/C/16/3143317

Land at 1 Hey Street, Bradford, BD7 1DQ

- The appeal is made under section 174 of the Town and Country Planning Act 1990 (the 1990 Act) as amended by the Planning and Compensation Act 1991.
- The appeal is made by Mr Khalid Hussein against an enforcement notice issued by City of Bradford Metropolitan District Council.
- The enforcement notice was issued on 17 December 2015.
- The breach of planning control as alleged in the notice is without planning permission the material change of use of the building on the land to a sui generis use as a night club, shisha lounge with sandwich bar, outside seating and smoking area and internet café ("the building").
- The requirements of the notice are to:
 - i. Cease the unauthorised material change of use
 - ii. Remove from the land and building all materials and equipment associated with the unauthorised use.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the ground set out in section 174(2)(c) of the 1990 Act as amended.

Summary of Decision: Appeal A is dismissed and the enforcement notice is upheld with a correction.

Appeal B: APP/W4705/C/16/3143275

Land at 1 Hey Street, Bradford, BD7 1DQ

- The appeal is made under section 174 of 1990 Act as amended.
- The appeal is made by Mr Khalid Hussein against an enforcement notice issued by City of Bradford Metropolitan District Council.
- The enforcement notice was issued on 17 December 2015.
- The breach of planning control as alleged in the notice is without planning permission the construction of a first floor side extension and the installation of two externally mounted roller shutters with shutter boxes and associated guide rails.
- The requirements of the notice are to:
 - i. Demolish the unauthorised first floor side extension
 - ii. Remove all resulting materials from the land
 - iii. Remove the two unauthorised externally mounted roller shutters, shutter boxes and associated guide rails
 - iv. Remove all resulting materials from the land
 - v. Make good any damage caused to the building as a result of compliance with the requirements of this notice.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (d) and (g) of the 1990 Act as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.

Summary of Decision: Appeal B is dismissed and the enforcement notice is upheld with corrections and a variation.

PRELIMINARY MATTERS

1. 1 Hey Street is a two storey building with a flat-roofed single storey garage to the side. The alleged uses subject to Appeal A take place within the first floor of the building and in the extension subject to Appeal B, which is formed over the garage.
2. I was unable to make an internal site inspection because the building was in use on the date of my visit. While this was regrettable, the parties suggested – and I agreed – that I could decide these appeals on the basis of an external viewing only. The development subject to Appeal B was visible from Hey Street. I could not see inside the building from the road – save for part of the extension – but since Appeal A proceeds on legal grounds only, it was unnecessary for me to see the interior on a date after the enforcement notice was issued.
3. Planning permission was granted on appeal (ref: APP/W4705/A/11/2160673) on 3 January 2012 for [use of the appeal building as] an internet lounge and sandwich bar with external seating area and smokers' shelter. I shall describe this as the '2012 permission'. The appellant referred to the decision in connection with Appeal A, but I also requested submissions from the parties on any relevance of the approved plans to Appeal B. I have taken account of the representations.

APPEAL A: MATERIAL CHANGE OF USE

4. The appellant made the appeal on ground (c) and argued that the matters set out in the notice do not constitute a breach of planning control. He also suggested, however, that the matters (in part) have not occurred, which is ground (b). The Council had an opportunity to respond and I shall consider Appeal A as proceeding on grounds (b) and (c).
5. Grounds (b) and (c) are legal grounds of appeal, where the onus of proof is on the appellant and the standard of proof is the 'balance of probability'. While it is helpful for a local authority to have evidence, they are not required to 'prove their case' when taking enforcement action as the appellant suggested. It is only necessary for the notice to state the matters which 'appear' to constitute the breach.
6. The notice does not specify the existing or lawful use of the building. While the lawful use is relevant to ground (c), it is not strictly necessary for a notice concerning a material change of use to specify what the change is from.

Appeal A on Ground (b)

7. The appellant argues that the uses of the building do not include a nightclub. He suggests that, although a nightclub 'is difficult to describe...it most certainly would involve opening until the early hours of the morning and the sale of alcohol'. It is true that there is no statutory definition of 'nightclub' but the appeal can still be considered by establishing the ordinary meaning of the word¹.
8. The Concise Oxford English Dictionary defines a nightclub as 'a club that is open at night and provides refreshment and entertainment'. That description, which is broader and more flexible than the appellant's, must be right. A nightclub would inevitably operate at night but exact opening and closing times will vary, and the sale of alcohol is not essential. Nightclubs can be aimed at different customers and provide different types of entertainment and refreshment.
9. The appellant has stated that the appeal venue is not open until 0500 hours and there is no sale of alcohol, but that is not enough to show that the building is not

¹ Article 3(6) of the *Town and Country Planning (Use Classes) Order 1987* describes 'night-club' as one of the uses which fall outside of any use class, but does not define the term for planning purposes.

used as a nightclub. Since the use of the property also includes use as a shisha lounge and internet café, I conclude on the balance of probabilities that the matters stated in the notice have occurred; the appeal on ground (b) fails.

Appeal A on Ground (c)

10. The 2012 permission for use as an internet lounge and sandwich bar was granted subject to conditions including that the premises should not be open to customers outside of 10.00 hours to 12 midnight daily, and the development should be carried out in accordance with the details shown on the approved plan PL-03 rev E.
11. Although the alleged use includes an internet café and a sandwich bar, the notice does not show, and the Council has not stated, whether the 2012 permission was implemented and/or remains extant. The appellant states that 'the use commenced around 2011/2012' – but this does not show that the permission was implemented in accordance with its terms and conditions. However, the Council's concern is that the existing use 'is materially different from that granted permission'.
12. Whether there has been a material change of use is a matter of fact and degree; there needs to be some significant difference in the character of the activities undertaken from what has gone on before. The notice describes the alleged use as 'a night club, shisha lounge...and internet café', and this must be interpreted as an allegation that the building is in a mixed use.
13. The appellant argues that use as a shisha lounge does not represent a material change of use from an internet café, because customers would visit both to meet and converse with friends and take refreshments; the only difference between the two uses is the smoking of shisha. However, the right question to ask, with regard also to my findings on ground (b), is whether a change of use to a mixed use as a nightclub, shisha lounge with sandwich bar and internet café is a material change.
14. If the approved internet lounge was or had been developed in accordance with plan PL-03 rev E, the primary use of the premises would essentially have been a café. The roof of the garage would have been enclosed but not covered for use as an 'external roof garden'; this would have included tables and chairs as in the main part of the building, and also a smoking shelter. Customers who smoked would have been able to do so at the premises, but only in a small covered space or on an open terrace. There is nothing on the plans or in the appeal decision to indicate that that shisha would be produced for sale and consumption on the premises.
15. As the appellant notes in respect of Appeal B and ground (g), a smoking area is essential for a shisha bar. The extension subject to Appeal B covers the garage and has its own roof. There is considerably more weather-proof space for smoking than would have existed whether or not the 2012 permission was implemented. I saw that extension includes comfortable seating and shisha paraphernalia; it seems that this part of the building – at least – is dedicated to smoking shisha. The appellant has not said whether or not shisha is prepared and sold on the premises, but that is normally the case. I find it likely that customers will visit the building specifically to buy and consume shisha – and this activity, facilitated by the extension, has led to a material change in the character of the use of the property.
16. I also note that the building is opened beyond midnight, contrary to condition no. 2 on the 2012 permission. Had this been the only breach of planning control, the Council could have served a Breach of Condition Notice or enforcement notice which alleged the same. However, it seems probable that the building is opened later *because* it is used as a nightclub and shisha lounge as well as internet café. The appellant has not shown otherwise – and yet the breach of condition or later opening will have caused a further change to the character of the use.

17. The Council has not submitted copies of the advertisements which led them to issue the notice, or explained what it meant by 'a more intensive use of the site'. However, that is not enough to assist the appellant, whose own evidence is scant and imprecise. On the balance of probabilities, I conclude that there has been a material change of use as alleged, and this is development which requires but does not benefit from planning permission. There has been a breach of planning control. The appeal on ground (c) fails.

Appeal A – the Notice

18. Under s176(1)(a) of the 1990 Act as amended, I may correct any error, defect or misdescription in the enforcement notice, provided that doing so would cause no injustice to the appellant or the Council. The notice requires that the 'unauthorised material change of use' must cease, but the change has occurred and it is simply the 'unauthorised use' which should stop. I shall correct the notice accordingly, since doing so would make the notice clearer but no more onerous.
19. Under s57(4), where a notice has been issued in respect of any development, planning permission is not required for its use for the purpose for which it could lawfully have been used if that development was not carried out. A requirement that the 'unauthorised use' should cease would not prevent use of the building as an internet café in accordance with the 2012 permission, provided that the permission remains extant.

APPEAL B: OPERATIONAL DEVELOPMENT

Appeal B on Ground (d)

20. An appeal on ground (d) is that, on the date when the notice was issued, it was too late for the Council to take enforcement action. As with grounds (b) and (c), the onus of proof is on the appellant, to a standard of the balance of probabilities.
21. Under s171B(1), where there has been any breach of planning control consisting in the carrying out of building operations, no enforcement action may be taken after the end of the period of four years beginning with the date on which the operations were substantially completed. The notice was issued on 17 December 2015, and so the material or four year date is 17 December 2011.
22. The revised plan PL-03 Rev E subject to the 2012 permission is, so far as relevant to Appeal B, the same as the original plan received by the Council on 13 April 2011. The previous Inspector visited the site on 5 December 2011, and so the plans and his decision should cast light on the appearance of the building prior to the material date. That said, the Council has admitted, contrary to its initial claim, that it has no photographs of the building in the past.

External Security Fencing

23. In his appeal statement, the appellant described the extension as being formed of 'an external fence (green painted security type fencing), with internal mesh and a clear polycarbonate sheet roof on timber joists'. The appeal on ground (d) relates to the 'external security fence' and not, therefore, the mesh, roof or joists.
24. The appellant bought the building outright in 2012, but had an interest in the land before then. He states that he carried out works in '2011/2012', but the external security fence was already present and he only altered it by painting it green. The appellant has no evidence to support his claims because 'people do not routinely take pictures of their property "just in case"'.

25. The 2012 Inspector described the 'proposed' use of the building as including 'part of the flat roof of the garage as a fenced seating area...' There is no indication in the appeal decision that any type of fencing was already in place. The plans stated 'existing fencing around perimeter of roof retained', but only depicted a 'proposed new framed wire mesh fence with 50mm x 50mm steel posts', up to 1500mm high.
26. The palisade-type railings which comprise the security fence are wider, higher and more closely spaced than the posts shown on the drawings. The appellant may be right that the mesh shown on the plans as 'proposed' is that which now exists, but that is not relevant. On the balance of probabilities, the external security fencing was not in place by the material date.

Roller Shutters

27. The appeal on ground (d) is also pleaded in respect of the roller shutters installed over the garage doorway and the adjacent (main) doorway which leads to the stairs to the first floor premises. Again, the appellant states that the shutters were in place when he bought the building, although he cannot verify that assertion. The 2012 Inspector did not refer to any roller shutters, but that is of little matter since his decision did not concern the ground floor front elevation.
28. The 2011 drawings include floor plans and a depiction of the front of the garage. As the Council suggests, the floor plans do not show any structure which could be a shutter box in the garage doorway. However, the elevation plan shows lines across and above the opening, which could depict a shutter and box. The plan states 'no alteration to the front elevation. All materials/openings to remain as existing'.
29. The appellant claims that he painted the roller shutters black. I saw that the garage shutter is painted black and the paintwork is in need of repair, suggesting that the finish is old. Taking the plans and its appearance, it is more likely than not that the garage roller shutter has been in place for more than four years.
30. The shutter box over the main entrance projects forward of the front elevation. The 2011 floor plans do not depict a shutter box here, and there is no drawing of this part of the elevation. The appeal statement includes photographs of the main entrance, but not with the roller shutter down. I saw that, while the shutter box was painted, the shutter itself was not and indeed it was fairly new in appearance. The appellant has not shown and there is no evidence that the roller shutter to the main doorway was installed before 17 December 2011.

Conclusion

31. Since the appellant has no photographs of the building from 2011, and he is represented by a professional planning agent, I am surprised that he did not make a sworn statement to support his claim for lawfulness. Even when an appeal is determined by written representations, it is not unusual for an appellant to submit a statutory declaration – because evidence that is neither sworn nor corroborated does not normally carry significant weight.
32. That said, unsworn evidence from an appellant should be accepted where it is not contradicted, and it is sufficiently precise and unambiguous. On the balance of probabilities, the security fencing and the roller shutter to the main doorway were not in place four years prior to the date of the notice. The appeal on ground (d) must fail in respect of those structures. However, Appeal B succeeds on ground (d) in respect of the roller shutter to the garage doorway. I shall correct the notice to exclude the garage roller shutter, its box and guide rails. The appeal on ground (a) does not fall to be considered in respect of that installation.

Appeal B on Ground (a) and the Deemed Planning Application

Main Issue

33. I consider that the main issue is the effect of the appeal development on the character and appearance of the appeal building and surrounding area.

Reasons

34. The appeal building forms part of a mill complex on the edge of Bradford city centre. The building is functional in design and construction, and it is much altered, particularly in respect of its ground floor openings. The adjacent mill is semi-derelict, giving the area a run-down feel, but there are also buildings in active use, including student accommodation facing the site.
35. To start with the extension, the security fencing is, as the term suggests, intended for a boundary and not a building treatment. As a result of their height and design, the railings have an obtrusive and intimidating appearance. The mesh is evident behind the fencing; it and the polycarbonate roof look insubstantial and unsightly. The timber joists, including a gable feature, are unfinished and add to the discordancy of the extension as a whole. For these reasons and because of its first floor position, the extension is unduly prominent. It unacceptably detracts from the appearance of the appeal building and the street scene.
36. I do not object to the green colour of the railings, but the paintwork is insufficient to disguise the poor quality materials of the extension as a whole. The appellant suggests that the extension would not be noticeable if the gable feature was removed and the fencing painted brown. Permission could be granted for the structure subject to conditions requiring such works, but they would not redress the unacceptably harmful appearance of the railings, mesh and roof.
37. As noted above, the approved plan subject to the 2012 permission shows the garage roof enclosed by mesh fencing with steel posts, and used to hold a timber smoking shelter. Even if the permission remains extant, the approved works would be less conspicuous than and would not justify my approving the appeal extension.
38. Turning to the roller shutter over the main doorway, it is narrower than over the over the garage, which I have found to be lawful. However, the garage shutter box is recessed, whereas the shutter box above the main entrance projects significantly from the face of the building. It is painted black and used for signage, but it is still a bulky and incongruous feature. The shutter guides to each side of the doorway also stand proud of and detract from the elevation. The shutter itself, made of solid steel, gives the building a hostile and degraded appearance. Painting the shutter black would not overcome the damaging visual impact of the whole installation.
39. There is another solid roller shutter on this building – over the doorway to the ground floor use – and there are others close by, all of which have protruding shutter boxes. However, I do not know if any of the shutters are lawful, or why any might have been permitted. In my view, the existing roller shutters exacerbate the neglected appearance of parts of this area – and do so through their design, not just lack of finish. They do not set a precedent for the appeal roller shutter, but rather cause the harm which the Council seeks here to address.
40. I conclude that the development causes unacceptable harm to the character and appearance of the appeal building and surrounding area. It conflicts with Policies D1 and UR3 of the *Bradford Unitary Development Plan*, which expect development to be well related to the character of the locality in terms of design and materials, and not have an adverse effect on the environment. It conflicts with the *National*

Planning Policy Framework, which expects development to add to the overall quality of the area and be visually attractive.

Other Matters

41. The appellant suggests that the appeal fencing may have been erected to prevent vandalism and people falling off the roof. He has not shown why railings of this height or design are essential for either purpose. There is no evidence that it is necessary to have a solid roller shutter to the main entrance, when other shutter designs or security measures are normally available.

Conclusion

42. For the reasons given and with regard to all other matters raised, I conclude that Appeal B should fail on ground (a) and the deemed planning application should be refused.

Appeal B on Ground (g)

43. Ground (g) is that the period specified by the notice for compliance with the requirements falls short of what is reasonable. The appellant requests that the period for compliance is extended from three to six months in relation to the requirements to demolish the extension (and associated materials).
44. The appellant states that the extension provides the only external smoking area, which is essential for a shisha bar; if the appeal fails, he would need time to find alternative premises for his business. In any appeal on ground (g) where relocation is an issue, the question has to be how much time would reasonably be needed to *look* for other premises; there can be no guarantee that any place would be found.
45. In this case, matters are more complicated because there is no appeal on ground (g) in relation to Notice A – and it requires that the unauthorised use must cease within three months. I could use my powers under s176(1)(b) to vary both notices, but the appellant has not shown in respect of Appeal A or B that it would take more than three months for him to look for alternative premises. That said, it would be reasonable to vary Notice B so that the extension need not be demolished until after the use has ceased.
46. I also observe that the Council might not object to the use of the building as an internet café – and the appellant might wish to use the premises for that purpose, rather than start again elsewhere. Given the possibility that the 2012 permission has lapsed, it would be reasonable to give the appellant time to make and receive a decision on a fresh planning application, and then remove the extension while perhaps developing an alternative roof terrace.
47. The appellant does not seek to extend the period for removal of the roller shutter and I see no reason to do so. I conclude, however, that it would be reasonable to allow him six months to remove the unauthorised extension, so that it can remain in place until after the unlawful use must cease and while he considers his options. I shall also allow six months for him to remove materials resulting from demolition of the extension and make good the building. Appeal B succeeds on ground (g).

DECISIONS

Appeal A: APP/W4705/C/16/3143317

48. It is directed that the enforcement notice is corrected by:

- deleting the text of paragraph 5i) and substituting: *Cease the unauthorised use.*

49. Subject to this correction, Appeal A is dismissed and the enforcement notice is upheld.

Appeal B: APP/W4705/C/16/3143275

50. It is directed that the enforcement notice is corrected and varied by:

- deleting the text *'two externally mounted roller shutters with shutter boxes and associated guide rails'* from paragraph 3 of the notice and substituting *'an externally mounted roller shutter with a shutter box and associated guide rails to the main entrance'*;
- deleting the text of sub-paragraph 5iii) in its entirety and substituting *'remove the unauthorised externally mounted roller shutter, shutter box and associated guide rails to the main entrance'*; and
- deleting the text of paragraph 6 in its entirety and substituting: *'6 months in respect of steps 5i) and 5ii); 3 months in respect of steps 5iii) and 5iv); and 6 months in respect of step 5v)'*.

51. Subject to the corrections and variation, Appeal B is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under s177(5) of the 1990 Act as amended.

Jean Russell

INSPECTOR