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## Appeal Decision

Site visit made on 22 November 2016

**by Mrs H M Higenbottam BA (Hons) MRTPI**

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

**Decision date: 31 January 2017**

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**Appeal Ref: APP/Z5060/C/16/3148465**  
**28 Station Parade, Barking IG11 8DR**

- 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 Ali Ashgar Kadhodayi-Kholghi against an enforcement notice issued by the Council of the London Borough of Barking & Dagenham.
- The enforcement notice was issued on 17 March 2016.
- The breach of planning control as alleged in the notice is 'Without planning permission, the unauthorised material change of use of the retail (A1) at the ground level of the property to a Café Bar (A3)'.
- The requirements of the notice are:
  - Cease the use as a café bar (A3).
  - Removal all alterations and fixtures related to unauthorised use for café bar business (A3).
  - Remove all subsequent waste material from the property.
- The period for compliance with the requirements is one month.
- The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended.

**Summary of Decision:** The appeal is dismissed and the enforcement notice is upheld with variations.

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### The notice

1. The allegation is that there has been a material change of use to a Café Bar (A3). Class A3 of the Town and Country Planning (Use Classes) Order 1987 as amended (UCO) is defined as 'Use for the sale of food or drink for consumption on the premises or of hot food for consumption off the premises.' It is clear that it is the consumption of food or drink on the premises which is being attacked and I will vary the allegation and requirements to reflect this in the interests of clarity. This would not result in either injustice or prejudice to the appellant or the Council.

### The appeal on ground (b)

2. This ground is that as a matter of fact the matters alleged in the notice have not taken place. To succeed on ground (b), the appellant must meet the burden of proof, which rests firmly with them, by demonstrating on the balance of probabilities that, at the time the notice was issued, the matters stated in it had not occurred as a matter of fact. Whether or not a material change of use has taken place is a question of fact and degree in each case.
  3. The allegation is that there has been a material change of use from retail (A1) to a Café Bar (A3). For there to be a material change of use there needs to be
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some difference in the character of the activities from what has gone on previously.

4. The appellant describes the premises as a coffee lounge where sandwiches can be purchased and some food is heated up. He states that no hot food is cooked on the premises and the number of seats/covers is limited to 14. He considers that the premises are within UCO Class A1.
5. Class A1 of is defined as '*Use for all or any of the following purposes—*

*(a) for the retail sale of goods other than hot food,*  
*(b) as a post office,*  
*(c) for the sale of tickets or as a travel agency,*  
*(d) for the sale of sandwiches or other cold food for consumption off the premises,*  
*(e) for hairdressing,*  
*(f) for the direction of funerals,*  
*(g) for the display of goods for sale,*  
*(h) for the hiring out of domestic or personal goods or articles,*  
*(i) for the washing or cleaning of clothes or fabrics on the premises,*  
*(j) for the reception of goods to be washed, cleaned or repaired,*  
*(k) as an internet café; where the primary purpose of the premises is to provide facilities for enabling members of the public to access the internet;*

*where the sale, display or service is to visiting members of the public.*

6. The appellant owns and runs the appeal unit and the nearby Barking Hotel. The hotel is physically separate and is accessed via a door in the flank elevation of No 24 up a flight of stairs where there is a reception area. However, I saw at my site visit that the appeal unit has an area at the front of the unit which is akin to a reception area, with a service area and seating area. It was confirmed that there was no internal access from the appeal unit to the hotel. The appellant states that this area was to cater for people with enquiries concerning the Barking Hotel. However, no substantiated evidence of numbers of persons coming to the appeal unit in connection with hotel enquiries and on the evidence available this use appears to be de minimis.
7. The area beyond the front reception area was laid out with two tables at right angles to the wall on the left hand side, with bench seats, and on the right hand side there was a long seating bench along the wall with four tables and chairs. A customer service counter, fridge with bottles of water, an ice cream maker, coffee machine, cups (both china and takeaway), glasses, and a food display cabinet with glass front facing out towards the seating. To the left hand side was a door leading to a toilet and, accessed from behind the service counter, towards the right hand side was a preparation area where there was a fridge, toaster, microwave, and oven. As well as loaves of bread, boxes of breakfast cereal and trays of eggs there were stocks of takeaway food trays.
8. The appellant seeks to rely on the advice contained in the now withdrawn Circular 03/2005 to support his contention that the operation of the appeal unit is within Class A1 and that there has been no material change of use to Class A3. While this advice has been withdrawn I note that at paragraph 34 it states:

*in considering where individual uses fall, it is the primary purpose that should be considered. A sandwich bar does not necessarily cease to be in the shops class merely because, for example, it also sells a limited amount of hot drinks, hot soup or food that is heated up. Similarly, it is possible for a few sandwich bar customers to eat on the premises, including at tables within or outside their establishments (e.g. on the forecourt) without involving a material change of use. Provided that this is only an ancillary part of their business, the classification of the business as a sandwich bar would rightly remain in the A1: Shops use class where the retail sales element is the primary purpose.*

9. The Council states that the following foods are advertised for table service: porridge, scrambled eggs on toast, English breakfast, banana long boat, fruit sundae and knicker-bocker-glory. In addition there are what appear to be screen shots in the Council's evidence of menus which include sandwiches, smoothies, fresh juice drinks, milkshakes and desserts.
10. The majority of the floor area of the unit is laid out as a place where food and beverages can be consumed. There is no substantiated evidence relating to sales of food or drinks for consumption off the premises or to demonstrate what, if any, retail sales activity takes place within the appeal unit. As such, on the evidence available and as a matter of fact and degree, there has been a material change of use of the appeal unit from a retail use within Class A1 of the UCO to a use for the consumption of food or drink on the premises within Class A3 of the UCO. I therefore conclude on the balance of probabilities that the matters stated in the notice, as varied, had occurred and the appeal on ground (b) fails.

### **Appeal on ground (a)**

#### **Main Issues**

11. The main issues in the ground (a) appeal are the effect of the Café Bar (Class A3 UCO) use on the function, vitality and viability of the town centre and the living conditions of nearby residential occupiers.

#### **Reasons**

##### *Function, vitality and viability*

12. Policy BTC2 of the Barking Town Centre Area Action Plan (February 2011) (AAP) designates the appeal site as forming part of the Primary Shopping Frontage of Barking Town Centre. Policy BE1 of the Borough Wide Development Policies Development Plan Document (March 2011) (DPD) permits a maximum of 15% of the measured primary frontage to be within UCO Classes A2 to A5. Policies CM5 and CE1 of the Core Strategy (CS) (July 2010) encourages development that helps maintain and enhance, promote and strengthen the vitality and viability of Barking Town Centre as a major centre.
13. The Council states that the percentage of non-Class A1 uses in the primary shopping frontage is 22.14%. Within the parade consisting of 24-38 Station Parade it is 38.4% of non-Class A1 uses. It is not clear whether the calculations take into account the appeal unit as a Class A3 use or not. However, even if the calculations do already take this use into account it is clear that the maximum of 15% set out in Policy BE1 is exceeded.

14. DPD Policy BE1 allows non-Class A1 uses to be introduced in excess of the 15% maximum where it can be demonstrated that a Class A1 use is no longer viable for retail purposes, there is no reasonable prospect of reuse despite attempts to market it at values prevailing within the parade/centre. There is no substantiated evidence to demonstrate any marketing of the appeal unit to satisfy the policy. As such, the use of the appeal unit for a purpose falling within Class A3 is contrary to DPD Policy BE1.
15. The AAP states that Barking Town Centre needs to improve its retail offer if it is to prosper. It is clear that the AAP proposed changes to frontage designations to protect the retail nature of the core of the centre and retain sufficient flexibility to accommodate other appropriate town centre uses. However, it is clear that a further dilution of the retail offer within the Primary Shopping Frontage and in particular the appeal parade would reduce the town centres retail function, vitality and viability. As such, I consider the use of the appeal unit for a UCO Class A3 use would harm the town centre and is unacceptable.

#### Living conditions

16. The reasons for service of the notice refer to harmful levels of noise disturbing neighbours. The Council in its evidence does not identify what noise and disturbance is generated by the use and which occupiers of which residential properties are affected. The Council suggest that hours of operation should be controlled and that opening hours of 0700 to 2000 hours would be appropriate.
17. The appellant states that hotel bedrooms of the Barking Hotel are located on the upper floors, above the appeal unit and he would not allow the use to result in noise and disturbance.
18. The appeal site is in a town centre location where there is likely to be activity till at least the early evening. I therefore consider that, subject to hours of operation being controlled, the use is unlikely to result in harm to the occupiers of the hotel or occupiers of residential properties that may be in the immediate vicinity. On this basis the appeal use would comply with Policy DPD BR13 and BP8 which directs new developments likely to generate harmful levels of noise away from existing noise sensitive locations and seeks to ensure that existing occupiers are not exposed to unacceptable levels of general disturbance or noise.

#### Conclusion

19. While I have found no material harm to the living conditions of nearby occupiers this does not outweigh the harm I have identified to the function, vitality and viability of the town centre. For the reasons given above I conclude that the appeal on ground (a) fails.

#### **Appeal on ground (f)**

20. This ground of appeal is that the requirements of the notice are excessive and that lesser steps would overcome the objections. In appealing on ground (f) the appellant must specify specific lesser steps which, in their view, would overcome the objections to the appeal development.
21. The Council state that the purpose of the Notice is to remedy the breach of planning control. The reasons for service relate to the effect on living conditions. In addition the Council refer in its evidence to the effect of the

material change of use on the function, vitality and viability of the town centre. I have accepted, in relation to the ground (a) appeal that living conditions of nearby residents could be safeguarded by the imposition of suitable hours of opening conditions. However, this does not overcome the harm to the function, vitality and viability of the town centre.

22. The cessation of the use and removal of fixtures from the appeal site, would remedy the breach of planning control and would be proportionate. Therefore in the absence of cogent evidence to the contrary I conclude that the requirement of the Notice is not excessive. The appeal on ground (f) fails.

### **Appeal on ground (g)**

23. This ground of appeal is that the time given to comply with the notice is too short. The Council has given a one month compliance period. The appellant has requested a period of three months.
24. The requirements relate to cessation of the use and removal of fixtures and fittings associated with that use. The removal of internal fixtures and fittings would not appear to be an onerous task. There is no substantiated evidence to demonstrate why a longer compliance period would be necessary. I therefore find, on the evidence available the compliance period is adequate and the appeal on ground (g) fails.

### **Conclusions**

25. For the reasons given above I conclude that the appeal should not succeed. I shall uphold the enforcement notice with variations and refuse to grant planning permission on the deemed application.

### **Formal Decision**

26. The enforcement notice is varied by:

- The deletion of the words 'retail (A1) at the ground level of the property to a Café' Bar (A3)' and the substitution of the words 'ground floor retail use (within Class A1 Town and Country Planning (Use Classes) Order 1987 as amended (UCO)) to use for the sale of food or drink for consumption on the premises (within Class A3 of the UCO)' in paragraph 3.
- The deletion of the words 'as a café bar (A3)' in the first bullet point of paragraph 5.
- The deletion of the words 'for café bar business (A3)' in the second bullet point of paragraph 5.

Subject to these variations the appeal is dismissed and the enforcement notice is upheld, and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

*Hilda Higenbottam*

Inspector