



Appeal Decision

Site visit made on 5 August 2019

by Gareth Symons BSc(Hons) DipTP MRTPI

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

Decision date: 2 September 2019

Appeal Ref: APP/T5150/C/18/3217639

11 Kilburn Bridge, Kilburn High Road, London NW6 6HT

- 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 Hashem Beik Mohammadi against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 6 November 2018.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the premises to a bar, restaurant, café and as shisha café and without planning permission, the erection of a structure to the rear of the premises.
 - The requirements of the notice are: 1. Cease the use of the premises as a bar, restaurant, café and as shisha café; 2. Demolish the structure to the rear of the premises and remove all items, debris and materials arising and associated with this structure and the use of the premises as a bar, restaurant, café, and as shisha café. 3. Remove all items associated with the unauthorised use, including the removal of all shisha pipes, tobacco, chairs, tables, charcoal burners and any other items associated with the unauthorised use, including refuse and other paraphernalia.
 - The period for compliance with the requirements is: 3 months after the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (c) and (f) of the Town and Country Planning Act 1990 as amended.
-

Decision

1. The enforcement notice is quashed.

The Notice

2. The appeal parties will be aware that before proceeding with my decision, I raised concerns about the structure of the Enforcement Notice (EN). I have considered carefully the response received from the Council which has been sent to the appellant's agent.
3. The EN attacks two distinct alleged breaches of planning control. The first is, in short, without planning permission the material change of use. The second is, without planning permission the erection of a structure. That is backed up in the EN by the words in brackets under Schedule 2 "the unauthorised change of use **and** development" (my emphasis). Whilst it correctly specifies that the unauthorised change of use took place within the last 10 years having regard to S171B of the Act, it should have also specified that the operational development had occurred within the last four years and not ten years, which in this case could only pertain to the alleged change of use. The steps required

by the notice needed to have also clearly related to each of the alleged breaches of planning control.

4. Furthermore, an EN shall specify the LPA's reasons for issue. In respect of the unauthorised structure the reasons for issue state that it facilitates the unauthorised use. The reasons do not cover the erection of the structure as a discrete item of operational development. To put it another way, the EN simply does not set out what planning harm the structure in itself causes, never mind the concern about the way that it may be being used. Nevertheless, based on how the EN has been assembled, I would be required to consider each alleged breach separately for each of the grounds of appeal pleaded.
5. A notice directed at a material change of use may require removal of works integral to and solely for the purpose of facilitating the unauthorised use, even if such works on their own might not constitute development, or be permitted development, or be immune from enforcement, so that the land is restored to its condition before the change of use took place. The framing of the reasons would suggest it was not the intention of the LPA to direct the Notice at the operational development separately. This is reinforced by the failure to specify the correct time limit.
6. To try and rectify these problems I have considered whether I could exercise my powers of correction under s176(1)(a). A way of doing that could be to delete the operational development breach, thus making the EN into a change of use notice only and then letting the requirements of the notice cover the removal of the structure. That would fit with the ten-year time limit specified and what I consider the Council might have really intended. It would also be line with the views I expressed in my previous communication that it is not always necessary to separately identify operational development associated with an alleged unauthorised use. The reasons for issuing the notice would then tally with the change of use allegation. However, doing that would deny the appellant consideration of whether planning permission should be granted for the structure and the case made out at appeal that it is "well designed" and "not visible from any public vantage points." There would be an obvious injustice on this point alone meaning that I am not satisfied that the power of correction should be exercised in this way.
7. Another alternative would be to maintain the separate allegations but correct the notice to refer to 4 years in relation to the operational development. The Council states it is accepted by all parties that the structure was built within the last four years. However, while the Council's statement refers to a site visit when the appellant allegedly confirmed that a new metal structure had been erected, there is no confirmation about when that took place and the appellant's submitted evidence does not support any such acceptance. The appellant makes no comment about how long the structure has been built. To my mind this raises the prospect that trying to remedy the problems with the EN in this regard could deny a possible ground (d) appeal. I recognise that the appellant could have potentially made such an appeal before now, but the lack of clarity in the EN over the applicable periods means that this may not have been an apparent option.
8. I acknowledge delays in the processing of appeals by the Planning Inspectorate are not ideal. In this case the appeal was submitted on 11 March 2019 and so it has not been 12 months before a decision has been made. I also have no

desire to prolong any uncertainty about the use of the premises for both sides. However, what is most important is effective enforcement that meets the relevant regulations and does not cause injustice.

9. For the reasons given above, I conclude that the enforcement notice does not specify the reasons for issuing the EN as it relates to the alleged unauthorised structure. It is not open to me to correct the error in accordance with my powers under section 176(1)(a) of the 1990 Act as amended, since injustice would be caused were I to do so. The enforcement notice is invalid and will be quashed. In these circumstances, the appeals on the grounds set out in sections 174(2)(c) and (f) of the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not fall to be considered. The Council is not precluded from taking enforcement action again under the second bite provisions.

Gareth Symons

INSPECTOR