



Appeal Decision

by Brian Cook BA (Hons) DipTP MRTPI

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

Decision date: 06 January 2020

Appeal Ref: APP/A5270/C/19/3221075

2-4 Uxbridge Road, Hanwell, London W7 3PP

- 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. Anas Kamar against an enforcement notice issued by the Council of the London Borough of Ealing.
 - The enforcement notice was issued on 10 December 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 shisha lounge.
 - The requirements of the notice are:
 - i) Cease the use of the premises as a shisha lounge;
 - ii) Demolish the rear canopy extension;
 - iii) Remove the decking and balustrades from the front of the premises;
 - iv) Remove the retractable canopy from the front of the premises; and
 - v) Remove resultant debris as a result of the works set out above.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2) (d) of the Town and Country Planning Act 1990 as amended. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act as amended have lapsed.
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Decision

1. The appeal is dismissed and the enforcement notice is upheld.

Application for costs

2. An application for costs was made by the Council against the appellant. This application is the subject of a separate Decision.

Preliminary matters

3. As noted in the summary details above, the fees were not paid in time and the appeal on ground (a) lapsed. The sole ground on which the appeal is proceeding is therefore ground (d), that when the notice was issued (10 December 2018) the period during which the Council could have taken enforcement action against the breach of planning control alleged had ended. The determination of the appeal therefore requires an assessment of the circumstances between the date when the breach first took place and the 10 December 2018.
4. Both the appellant and the Council have provided a number of dated images of the appeal property and the immediately surrounding area which are of assistance to that assessment. On the appeal form the appellant confirms that the Inspector could see the relevant parts of the appeal site sufficiently to

judge the proposal from public land. The appellant also states in evidence that the use alleged has ended. In those circumstances it seemed to me that no further assistance would be provided by a site visit just over a year after the notice was issued. Accordingly, I have determined the appeal on the written evidence submitted.

The appeal on ground (d)

5. Where it appears to a local planning authority that an unauthorised material change of use has taken place, the period during which enforcement action may be taken is 10 years from the date when the breach of planning control first occurred. When an appeal is made against such a notice on this ground, the onus is on the appellant to demonstrate on the balance of probabilities that the use alleged started prior to the date of issue of the notice and thereafter continued substantially uninterrupted for a period of not less than 10 years. In this case therefore the appellant must show that the use alleged began not later than 10 December 2008.
6. In fact, the appellant makes no case on this ground of appeal in respect of the alleged material change of use. In respect of that, the appellant states that he relies on ground (a) and refers to a planning application submitted simultaneously with this appeal. From the planning history provided by the Council this may be a planning application¹, the decision on which is pending, although the appellant gives a different reference².
7. The appeal on ground (d) explicitly relates only to the raised front patio, the front retractable canopy and the rear canopy extension; the latter two being elements that the notice requires to be removed in addition to the use ceasing. In each case the appellant asserts that they had been in place for more than 4 years when the notice was issued. Although the appellant does not claim immunity from enforcement action as a result, that is the inference that I draw from the way the matter is put. In each case too the appellant also relies on ground (a) and refers again to the submitted planning application.
8. The courts have established that a notice directed at a material change of use may require the 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.
9. Images have been provided by both parties, some of which are the same. In the Council's images from 2006 and 2008 a canopy is shown at the front of the shop unit, which appears at the time to be selling fresh fruit and meat; a raised patio is clearly present at the front of the shop.
10. The Council first received a complaint about a shisha use in 2012. Images from January 2012 show the same open raised patio and what appears to be a different canopy. A later image, which the Council says is from 2013, shows the raised patio now enclosed by a low-level, close-boarded fence with a structure above. Although not visible in the image, a planning application submitted in 2013³ included retention of the decking area to the front within

¹ 190296FUL

² PP-07569399v1

³ P/2013/4771

the development for which planning permission was sought. A further image from August 2015 again shows an enclosure around the raised patio area although it appears to be different to that shown in 2013.

11. In support of the ground (a) appeals the appellant states that the balustrading allows a level of privacy for those using the patio area which, as indicated above, has been decked while the front canopy has been introduced in order to shelter customers in adverse weather conditions and may assist in reducing noise and/or any other inconvenience to neighbouring residents. It also provides good levels of privacy for both the restaurant customers and neighbouring residents.
12. The appellant does not state when these elements were provided. The evidence is directed at establishing that both were substantially complete in the 2012 to 2014 period. From the Council's images these two elements appear to have been provided between January 2012 when the balustrading is certainly absent and July 2013 when it has been installed. This is the period during which the Council received the first complaint of the use alleged as the breach of planning control.
13. On the balance of probabilities therefore I conclude that the decking and balustrades and the retractable canopy at the front of the premises have been provided to facilitate the unauthorised use alleged. Notwithstanding that they may have been in place for more than 4 years when the notice was issued, they may therefore be required to be removed by the notice.
14. Turning to the rear canopy extension, in support of the ground (a) appeal the appellant contends that this serves the same purpose as that at the front while also providing some measure of protection to those using the rear area in connection with the alleged use from the noise and disturbance from the adjoining car wash.
15. The only image of the rear area provided by the Council is one taken shortly before the notice was issued. The appellant has provided images of the rear dated 2008 and 2012. The rear canopy appears to have a much different appearance in 2012 to that in 2008 when its purpose appears to be provision of shelter for two structures, possibly used for storage. In the absence of any evidence to the contrary from the appellant I conclude on the balance of probabilities that the 2012 image canopy was provided to facilitate the shisha use first complained of in that year. Again, notwithstanding that it may have been in place for more than 4 years when the notice was issued, it may be required to be removed by the notice.
16. To summarise, the appellant has provided no evidence to support the appeal that the use alleged had been continuous for a period of at least 10 years at the date when the notice was issued. The appeal on ground (d) must therefore fail. Whether or not the structures required by the notice to be removed had been in place for at least 4 years when the notice was issued, the courts have established that their removal may be required if they have been provided solely to facilitate the unauthorised change of use. On the balance of probabilities, I conclude that is the purpose for which each has been provided.
17. No appeal was made on ground (f), namely that the requirements of the notice exceed those necessary to remedy the breach of planning control or, as the case may be, the injury to amenity. I have considered if the case made by the

appellant could nevertheless be construed as an argument on this ground (and therefore what is termed by the Planning Inspectorate a 'hidden' ground of appeal) but have concluded that it could not; it is very clearly directed at grounds (d) and (a) only.

Conclusion

18. For the reasons given above I consider that the appeal should not succeed.

Brian Cook

Inspector