



Appeal Decision

Site visit made on 30 January 2020

by Brian Cook BA (Hons) DipTP MRTPI

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

Decision date: 12 February 2020

Appeal Ref: APP/G5750/C/19/3222297

126 Upton Lane, Forest Gate, London E7 9LW

- 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 M Yousaf (Indiano Pizza) against an enforcement notice issued by the Council of the London Borough of Newham.
 - The enforcement notice was issued on 18 January 2019.
 - The breach of planning control as alleged in the notice is without planning permission the material change of use to a hot food takeaway (A5).
 - The requirements of the notice are:
 - i) Cease the use of the premises as a hot food takeaway (Use Class A5).
 - ii) Remove from the property all fixtures and fittings which solely facilitate the use of the site as a hot food takeaway (Use Class A5).
 - iii) Remove from the property all advertisements in respect of the use of the premises as a hot food takeaway (Use Class A5).
 - iv) On completion of steps (i), (ii) and (iii) above, remove all materials and debris from the site.
 - The period for compliance with the requirements is three months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Decision

1. The appeal is dismissed and the enforcement notice is upheld. Planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Nullity

2. The appellant claims the notice is a nullity. The reason is that requirements (ii) and (iv) in the summary details above are unclear and uncertain. The appellant cannot know from within the four corners of the notice what it is he has to do to comply with the notice and avoid the possibility of prosecution.
3. The courts have been very clear 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. The wording of requirement (ii) reflects the judgement of the courts and is similar to that found in hundreds of such notices. Requirement (iv) simply requires the resulting materials to be removed.

4. In its response to the appeal on ground (f) the Council accepts and acknowledges that it is the property owner rather than the Council who will know what fixtures and fittings solely facilitate the unauthorised use. It follows therefore that it is for the appellant to determine what they are and remove them.
5. The notice is therefore perfectly clear on its face. It is not a nullity.

The appeal on ground (e)

6. In an appeal on this ground the appellant is required to show that the notice was not properly served on all those with an interest (as defined) in the land. In this case, the appellant seeks to reverse the onus of proof, arguing that the Council must show proper service. The appellant fails to identify who should have been served but has not been or how they may have been prejudiced by such a failure.
7. In any event, the Council has provided both the certificate of service and the list of those served. The Council confirms that these persons were identified both from its own resources and from official Land Registry documents.
8. The appellant also refers to another appeal decision¹ where the Inspector concluded that the notice had not been properly served. However, in that case, the Council (the London Borough of Enfield) provided only the notice of decision to refuse a retrospective planning application for the development alleged as being the breach of planning control. No evidence of authority to take enforcement action, such as the delegated decision records, were provided.
9. That is not the case here. Not only is the enforcement notice signed by Amanda Reid as the Council's authorised officer, the delegated report recommending service of an enforcement notice and seeking authority to do so is signed by Dan Myers as the authorising officer by and on behalf of Amanda Reid who is head of Planning and Development at the Council. While the Council does not address this specific point in its response, in my experience it is quite usual for such matters to be delegated to the head of service. On the balance of probability, I conclude that the notice has been served in accordance with the Council's scheme of delegation.
10. There is therefore no evidence that the notice was improperly served. In fact, all the evidence indicates that it was served in accordance with the statute.
11. The appeal on ground (e) therefore fails.

The appeal on ground (d)

12. As the appellant acknowledges, 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 18 January 2009 (the material date).

¹ APP/Q5300/C/15/3006366

The evidence

13. The appellant's case on this ground is that planning permission² was granted in 1992 for the change of use of the ground floor of 128 and part of the ground floor of 126 to a restaurant. Use Class A5 (hot food takeaway) was not introduced until 2005. Prior to that, it was included within Use Class A3 as was a restaurant use. When the planning permission was granted in 1992, there was no Use Class A5.
14. The appellant also contends that the Council's failure to identify the previous use in the notice raises a concern that it does not, in fact, have sufficient evidence to prove that the premises has been in another Use Class than A5.
15. The Council's evidence on this ground of appeal is contained principally in the officer delegated report on an application³ under s191 of the Act for the use of the premises now alleged as the breach of planning control. The Council acknowledges the 1992 planning permission but states that Google Street View images show that No 126 became a separate planning unit from No 128 around 2008. The same set of images show that No 126 was in use as a cash and carry/grocer's shop; a unit in Use Class A1. That use continued until at least 2012. The first Street View image showing Indiano Pizza trading is dated 2014. Other evidence provided by the applicant at that time corroborates 2013 as the date when the Indiano Pizza use began.

Appraisal

16. Although it can assist the judgement as to whether a change of use is a material change, a local planning authority is not required to specify the previous use of the land where a material change of use is alleged as the breach of planning control. There is no basis therefore for the inference that the appellant seeks to draw from the omission in this case.
17. The appellant has provided no evidence to establish that the use of the premises as a hot food takeaway has continued substantially uninterrupted for any 10-year period before January 2018. On its own, the mere grant of planning permission in 1992 does not amount to the necessary evidence.
18. While the Council has not provided any of the Street View images that it relied upon when coming to its decision on the s191 application, in my view, the totality of its evidence is more than enough to contradict or otherwise make the then applicant's version of events less than probable.
19. I therefore conclude, on the balance of probability, that the use alleged did not commence until considerably after the material date. The appeal on ground (d) therefore fails.

The appeal on ground (a) and the deemed planning application

20. The terms of the deemed planning application are defined by the breach of planning control alleged. The deemed application is therefore for change of use to a hot food takeaway (Use Class A5).

² 92/0658/PLAN

³ 18/03252/CLE

Preliminary matter and main issues

21. A consolidated version of the London Plan incorporating all the Mayor's suggested changes was produced in July 2019. The Panel's report was published in October 2019. It relates to the July 2019 version and recommends that all of the Mayor's minor and further suggested changes be incorporated within the published Plan unless recommended otherwise. In the light of the advice given in paragraph 48 of the National Planning Policy Framework I give significant weight to the London Plan policies as they are to be approved.
22. The main issues for my determination of this ground of appeal are the effect of the development carried out on:
 - (a) The mix of retail uses in the local area with regard to the cumulative impact on healthy and sustainable places; and
 - (b) The living conditions of occupiers of neighbouring properties with regard to noise and disturbance.

Reasons

Cumulative impact

23. Although there are retail units on Upton Lane and on part of St Georges Road, the Council advises that this is not a defined town or local centre. There is a large secondary school between Grosvenor Road and St Georges Road and the remainder of the area has a residential character.
24. The Council's evidence, which the appellant does not dispute, is that there are more than three other takeaway shops within 400m of the appeal site.
25. At the time of my site visit, there appeared to be about 11 retail units on that part of Upton Lane within which the appeal property is situated. Some were closed and, with the roller shutters down, it was not clear if some were still trading. Nevertheless, there was a further pizza takeaway two units away from the appeal site and what may be an African food takeaway between the two. There was also a Chinese takeaway on St Georges Road although I am not sure if that was within 400m of the appeal site. On balance however, it seems to me that the situation now is still as described by the Council in the officer delegated report a year ago.
26. The London Borough of Newham Local Plan (LP) adopted in December 2018 recognises the cumulative effect of concentrations of such uses on the local area in respect of noise, litter and general disturbance and on the Council's wider objectives to promote healthy lifestyles and create healthy neighbourhoods. Proximity to a school, as in this case, is therefore of additional concern.
27. LP policy SP9 sets out a number of linear and area concentrations to avoid the over-concentration of specific uses which include takeaways. The area concentration requires that there are no more than three premises in the same specified use within 400m of each other. The Council states that the other such premises it has identified are lawful. The introduction of the alleged use of the appeal property therefore adds to those already within the 400m area and thus conflicts with LP policy SP9.

Living conditions of neighbouring occupiers

28. As noted above, the area has a residential character. There is, according to the Council, residential accommodation above the ground floor retail units and properties on Skelton Road are arranged in terraces of two-storey dwellings to both sides. There is a service passage to the rear of the Upton Lane properties.
29. From Skelton Road looking along this passage at least three large flues of the type commonly associated with hot food takeaways were evident. These can be noisy and tend to emit cooking odours into the near neighbourhood.
30. As the Council notes, takeaways of this type are also significant traffic generators as people come to collect their food and meals are taken away to be delivered to customers.
31. Both of these factors can cause noise and disturbance to residential occupiers over the period of trading which the Council says, without contradiction by the appellant, is between 11.30 and 23.00 on all seven days of the week.
32. In my view, that level of noise and disturbance has an unacceptable impact on residential occupiers close by. The development therefore conflicts with LP policies SP3 and SP8 in this regard.

Conclusion

33. The appellant's case on this ground of appeal is, in essence, that the use as a takeaway is not materially different from that as the restaurant approved in 1992. Although the appeal statement says that this 'will be explored further in the additional information' no such information has been submitted.
34. I agree with the Council that conditions such as one that restricts the hours of opening, may be capable of overcoming the objection to the development on the second main issue. However, the appellant has not indicated that any such condition would be acceptable and, in any event, the policy objection to a development of this type in this location would remain.
35. For all these reasons, the appeal on ground (a) does not succeed and planning permission for the deemed planning application will not be granted.

The appeal on ground (f)

36. The appellant raises two points on this ground of appeal.
37. The first relates to requirement (i) in the summary details above. The appellant mistakenly interprets this as the Council requiring the unit to become vacant as it does not allow any alternative use.
38. This is not the case. Requiring the use to cease is the proper and wholly proportionate step to specify where an unauthorised material change of use is the breach of planning control. It is not for the Council to specify the next use to which the property should be put. That is for the property owner to decide, applying for planning permission as necessary.
39. The second relates to the criticism of requirement (ii) which I have already addressed under 'nullity' above.
40. The appeal on this ground therefore fails.

The appeal on ground (g)

41. The appellant argues that a period of 10 months is required both to find a suitable contractor and to allow the necessary work to be carried out in weather appropriate for the task. The appellant further argues that the Council has not struck a fair balance between the protection of the owner's and occupier's Human Rights (Articles 1 and 8) and the objective of enforcing proper planning control in the wider public interest.
42. As the appellant recognises and states Articles 1 and 8 are qualified rights which '...can be interfered with if the action to be taken is lawful, serves a legitimate aim and is necessary and proportionate to the particular circumstances of the case.' This was specifically addressed by the Council in its officer delegated report where it says:
- In taking enforcement action this would amount to an interference with the landowner's rights under Article 1 of the First Protocol (Protection of Property), it is considered that this interference would be in accordance with the law, in that it would pursue the legitimate aim of protecting the environment and will be proportionate in all the circumstances. It is also considered that enforcement action will not have a disproportionate effect on the interests of the owners.
43. The Council has therefore struck what it considers to be a fair balance and I see no reason to come to a different view. While Article 8 is referred to, the appellant has provided no further information to explain how his Article 8 rights are affected. It is not clear to me that they are and, in any event, they are qualified, not absolute, rights.
44. Turning to the period allowed, the three months specified seems to me perfectly adequate to carry out the requirements which are not onerous. It is not clear to me why the work, which will amount mainly to internal alterations, should be weather-dependent.
45. The appeal on this ground therefore fails.

Overall conclusion

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

Brian Cook

Inspector