



Appeal Decisions

Site visit made on 24 June 2020

by K R Saward Solicitor

an Inspector appointed by the Secretary of State

Decision date: 10 July 2020

2 Chapel Road, Wisbech, Cambridgeshire PE13 1RG

Appeal A: APP/D0515/C/19/3224948

Appeal B: APP/D0515/C/19/3224949

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
 - The appeals are made by H20 Sanzokuou Ltd (Appeal A) and Mr S Rafique (Appeal B) against an enforcement notice issued by Fenland District Council.
 - The enforcement notice was issued on 21 February 2019.
 - The breach of planning control as alleged in the notice is without the benefit of planning permission, the material change of use to mixed use as restaurant/bar/nightclub and snooker hall and the erection of 2.47 metre high fence to rear.
 - The requirement of the notice is to cease the unauthorised use of the premises as a restaurant/bar/nightclub.
 - The period for compliance with the requirements is 3 months.
 - Appeal A is proceeding on the grounds set out in section 174(2)(a),(b),(c),(d)&(f) of the Town and Country Planning Act 1990 as amended. The application for planning permission deemed to have been made under section 177(5) of the Act as amended also falls to be considered.
 - Appeal B is proceeding on the grounds set out in section 174(2)(b),(c),(d)&(f) 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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Decisions

Appeal A

1. It is directed that the enforcement notice be varied by substituting 6 months as the period for compliance. Subject to that variation, 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.

Appeal B

2. It is directed that the enforcement notice be varied to substitute 6 months as the period for compliance. Subject to that variation, the appeal is dismissed and the enforcement notice is upheld.

Preliminary matters

3. The alleged breach of planning control includes the erection of a 2.47m high fence to the rear of the appeal site. No mention of the fence is made in the requirements. The effect of section 173(11) of the 1990 Act is that

unconditional planning permission would be treated as having been granted for the fence once there is compliance with the requirements of the notice.

4. I therefore queried whether this omission was intentional. The Council responded to say that it had deliberately excluded the requirement to remove the fence. It confirmed that there is no objection to the fence remaining on site. In light of the Council's response, it is unclear why the fence was included in the allegation. No correction has been requested or is required to the notice.
5. Following submission of the appeals there has been a change in ownership of the appeal premises, but the appeals proceed in the name of the original appellants.
6. Grounds (b) and (c) are referred to as legal grounds of appeal. When making an appeal on legal grounds the burden of proof is on the appellant and the test of the evidence is the balance of probabilities.
7. My site visit took place during a period of closure of the business premises due to ongoing restrictions for the coronavirus pandemic.

Appeals A & B - ground (b)

8. This ground is that those matters alleged in the notice have not occurred. In order to succeed on this ground, it would need to be demonstrated that there is not a mixed use as a restaurant/bar/nightclub and snooker hall, as alleged.
9. The appellants argue that there is no 'nightclub' or other 'club' use undertaken on the ground floor and customers do not have to take out any form of membership to enter. In addition, they say there is no 'restaurant' use taking place although food and alcohol is available incidentally to the main activity for the provision of music for dancing.
10. There is no definition of 'nightclub' specifically used for planning purposes. In essence, a nightclub will commonly be understood to be a place to drink, dance to loud music and socialise with entertainment often provided in the form of a DJ or otherwise. By its very nature it is somewhere open late into the night. It is plain that a nightclub use can occur without requiring any form of membership.
11. Under ground (a) Appellant A says that "The upper floor of the building has been used as a nightclub/bar snooker hall for many years...". The appellants repeat under ground (f) that a nightclub use has taken place on the first floor for a number of years. From these comments the appellants clearly acknowledge that a nightclub use is taking place albeit upstairs only.
12. Where there is a mixed use, two or more primary uses are taking place within the same planning unit or unit of occupation. It does not matter if the nightclub use only takes place in part of the premises as long as it does not form a separate planning unit. If that were the case then the notice would be wrong to describe it as part of a wider mixed use.
13. The appellants do not dispute that there is currently a single planning unit. Indeed, under ground (f) they suggest that the building could be divided into two separate planning units, clearly acknowledging that it is not at present.
14. During my site visit I saw that the building is laid out over two floors. There

- were two separate entrances; one for the 'VIP LOUNGE', the other for 'Kennedy's Sports and Entertainment Bar'.
15. The VIP Lounge is located on the ground floor. It is accessed via an entrance lobby where payment is taken. There is a cloakroom off it. Customer notices displayed in the lobby area advise that "The VIP Lounge nightclub [*my emphasis*] holds no responsibility for any items lost or stolen on these premises". The main room contains a long bar, seating areas and a dance floor with several disco balls hanging overhead. At the rear of the dancefloor is a stage with mixing deck, amplifiers and microphone.
 16. There was no sign of any nightclub use on the first floor which was laid out with snooker/pool tables and a bar with kitchen off it. At the far end of the room was a large screen TV and a couple of dart boards. I also note that the appellants' acoustics report from 2018 states that "the upper floor is not part of the entertainment establishment" which reinforces that the nightclub use was confined to the ground floor when the notice was issued.
 17. The 'VIP Lounge' has a presence on social media describing itself as a 'dance club & nightclub'. A screen shot taken in November 2019 says: 'The largest nightclub in Wisbech is proud to announce the grand opening of The VIP Lounge on New Year's Eve 2016 at Chapel Road, Wisbech'.
 18. Not only is 'The VIP Lounge' described as a nightclub in its advertising but the type of activity and opening times falls squarely within what would ordinarily be regarded as such. That is precisely what the evidence indicates has occurred.
 19. Posters for 'The VIP Lounge' found online also say that it is a nightclub open from either 9pm or 10pm until 3am. They advertise various events throughout 2019 such as a summer and Halloween party. The earliest was posted on 31 January 2019 for a 'Glow Weekend' taking place on 1st and 2nd February 2019. One poster advertises a 'NEW DJ PLAYING' on 6 April (2019) from 9pm-3am and another new DJ in October 2019. These demonstrate that there was a nightclub use taking place when the enforcement notice was issued on 21 February 2019 which continued thereafter.
 20. The type of activity advertised would certainly not fit within the somewhat quaint term of a 'dance hall' reminiscent of days gone by where people would pay to go and dance in a large room or building.
 21. When planning applications were made in 2017 and 2018¹ both described the development as: '*Retrospective change of use to mixed use restaurant/bar/club on ground floor. Construction of screening fence to rear yard, extension for proposed kitchen.*' The existing use given in each application is 'now used as a bar/club/restaurant' and refer to the 'snooker hall above'. Both applications were refused, the being development described in the Council's decisions as '*Change of use to mixed use A3/A4 restaurant/bar/club (ground floor) and D2 Snooker Hall (first floor).....*'. As the applications were retrospective there was clearly a restaurant as well as a bar and club use already taking place.
 22. In the Officer's report for the 2018 application it was noted that A3 and A4 use classes were ascribed in the application rather than a *sui generis* nightclub use. In refusing planning permission in September 2018, the scheme was assessed as a drinking establishment that includes night-time entertainment rather than

¹ Council refs: F/YR17/0549/F and F/YR18/0459/F

- a nightclub use per se. Nevertheless, when there is a mixed use the uses do not fall within any particular use class.
23. The applications confirm there was an ongoing restaurant use along with a bar and club activity taking place prior to the notice being issued.
24. The appellants suggest that the restaurant is not a primary use but ancillary to what I have found to be a nightclub use. That is inconsistent with the description given by Appellant B when applying for planning permission in 2018. Indeed, the allegation reflects the mixed use for which planning permission was sought.
25. Ancillary uses are not distinguished by scale, although that can be relevant. The essential feature is that there is a functional relationship between the ancillary and primary uses and that relationship is one that is normally found.
26. I saw on the first floor a seating area where food could be consumed and cleared space where tables and chairs could be laid out. Numerous chairs were stacked up given the present state of closure. There was a commercial kitchen and bar menu displayed both at the bar and downstairs entrance door. Menus were also available to be placed on tables offering cooked meals. By the time of my visit, I understand that an internal partition had been removed from the first floor and additional snooker/pool tables added.
27. Obviously, the layout is not as the appellants describe in their Appeal Form as the alleged nightclub use is on the ground floor, not the first floor. There was no sign of a restaurant use on the ground floor where the nightclub use takes place and as applied for in 2017 and 2018. However, there was evidence of a restaurant use on the first floor. At what point this changed is unclear, but that does not matter so long as there was a restaurant use as part of the mixed use of the building as a whole.
28. As a matter of fact and degree I am satisfied on the evidence before me that at the time of issue of the notice the restaurant use was more than ancillary to any other use taking place. On the balance of evidence, it constituted a primary use in its own right.
29. There is one building in single ownership with several different functions within it albeit operating as different businesses on each floor. The ground and first floors areas are connected by a fire door and the building clearly is in a mixed use. The use has not been limited to the provision of music for dancing as suggested. There is a single primary *sui generis* use comprised of a number of disparate activities to form a mixed use as identified in the allegation.
30. I find as a matter of fact that those matters as alleged have occurred. The ground (b) appeals fail.

Appeals A & B - ground (c)

31. The onus is on the appellants under this ground of appeal to make out the case that the matters alleged in the notice do not constitute a breach of planning control. A breach of planning control comprises the carrying out of development without the required planning permission.
32. Planning permission was granted in 1985² for the use as a snooker centre.

² Council ref: F/0807/85/F.

There followed permissions in 1986 and 1987³ for the change of use of the ground floor to a leisure centre with the upper floor remaining as a snooker hall. It is argued that the authorised leisure use is in effect a Class D2 use within the Town and Country Planning (Use Classes) Order 1987 as amended ('UCO') and there is no material change of use because "dance halls" are also a stated Class D2 use.

33. If the use remains within the same use class and is not *sui generis*⁴ then, by virtue of section 55(2)(f) of the 1990 Act, no development is involved.
34. The UCO explicitly excludes a use as a nightclub from any of the classes specified in the Schedule to that Order. Therefore, the UCO distinguishes between a Class D2 dance hall and a nightclub which is *sui generis*. They are different uses. I have found the use to be a nightclub rather than a dance hall.
35. In any event, where a property is in a mixed use there is a single mixed use with all its component activities. It is classified as *sui generis* even if individual components might on their own fall within a described use class.
36. Even if there had been a Class D2 leisure use within a single planning unit, the Officers report from the 2018 planning application indicates that it involved a smaller area. There is now a mixed use composed of restaurant, bar, nightclub and snooker hall uses. There will have been a material change of use once the use changed from a leisure use to a different primary use. Indeed, a material change of use will have occurred each time a new primary use was added within the same planning unit to form a different mixed use.
37. The mixed use attacked by the notice constitutes development under section 55 of the Act requiring express planning permission which has not been obtained.
38. I conclude that the matters alleged in the notice constitute a breach of planning control. The appeals on ground (c) fail.

Appeals A & B - ground (d)

39. The ground of appeal is that at the time the notice was issued it was too late to take enforcement action.
40. To succeed on this ground the appellants must demonstrate that the change of use to the mixed use as a restaurant/bar/nightclub and snooker hall occurred at least 10 years before the issue of the enforcement notice on 21 February 2019 and continued without material interruption throughout that period.
41. The appellants maintain that the use has occurred for more than 10 years but have not produced any substantive evidence in support.
42. When the planning applications were made for the 'retrospective change of use to mixed use restaurant/bar/club on ground floor' in 2017 and 2018, it was declared that the change of use started on 1 December 2016 and was completed on 30 December 2016. That corresponds with the announcement on social media that 'The VIP Lounge' opened as a nightclub the following night on 31 December 2016. There is no evidence of the mixed use now enforced against taking place prior to that date.

³ Council refs: F/0769/86/F and F/1337/87/F respectively.

⁴ a Latin term meaning 'in a class of its own'.

43. The appellants have failed to discharge the burden of proof to demonstrate that the change of use occurred at least 10 years prior to the issue of the enforcement notice to be immune from enforcement action. The appeals on ground (d) fail.

Appeal A only - ground (a) and the deemed planning application

Main Issue

44. The main issue is the effect of the change of use on the living conditions of residential occupiers within the vicinity of the appeal site with particular reference to noise and disturbance.

Reasons

45. The appeal property is a two storey commercial building located within the Bowthorpe Conservation Area. There are a mix of uses in the surrounding area. Chapel Road is a long street with a rugby club and pitches towards one end and an assortment of businesses elsewhere along the street with some residential accommodation also. The building itself immediately fronts onto the pavement. It has a small enclosed rear yard area (with covered decking area) surrounded by properties in various uses including a bingo hall, hotel and residential. There are flats in very close proximity in Exchange Square.
46. Some residents complain of regularly disturbed sleep due to noise emanating from the nightclub. They also describe disturbance from patrons leaving the premises and anti-social behaviour in the street during the early hours of the morning. Residents are supported in their objections by the local ward member and Wisbech Town Council.
47. It is the appellants case that the upper floor of the building has been used as a nightclub /bar/snooker hall for many years without causing the harm identified in the enforcement notice. They say the ground floor is capable of being operated as either a restaurant, nightclub or drinking venue or a combination of these if sound insulation works are undertaken.
48. The deemed planning application arising under ground (a) is for the development enforced against which is a mixed use of the premises as a whole for a restaurant/bar/nightclub and snooker hall.
49. A Premises Licence was issued in October 2016 for the property under the Licensing Act 2003. Aside from licensing and planning being different regimes, the Licence was issued prior to the opening of the venue at ground floor level.
50. When planning permission was sought in 2018⁵, the application was supported by an acoustics report prepared by an independent acoustic consultancy company. The Council considered that report and decided to refuse permission. No appeal was brought against that decision.
51. The report relates to what is called the 'H20 Night Club'. It seeks to respond to the Council's Environmental Health Officer ('EHO') analysis of a proposed noise management plan for the premises.
52. Environmental Health had monitored noise levels from inside a neighbouring residential property on two nights in August 2017. Recordings were undertaken

⁵ Council ref: F/YR18/0459/F

- at a time when the nightclub had moved to a ground floor location and had installed a noise limiting device. The results demonstrated sound levels in excess of 25dB above typical background noise levels in the early hours of the morning which the EHO concluded to be unreasonable.
53. The acoustic report notes the brick/block construction with separating concrete floors. It records that the internal walls and front windows are lined with plasterboard and lobby areas created to both the front and rear accesses to assist with the reduction of internal noise outbreak. The report criticises the EHO's understanding of the technical details within the sound insulation assessment. Further, it suggests that a proper inspection of the appeal site has not been carried out and to observe the measures undertaken internally. It goes on to suggest that other establishments in the vicinity not associated with the H20 Nightclub could be the cause of noise disturbance to neighbours.
54. It is concluded that provided a limiting device is properly calibrated and operational, amenity in the receptor areas will be protected as sound levels from entertainment will be suitably controlled. The report proceeds to say that subject to a planning condition, 'suitable attenuation can be designed and provided for the restaurant at the appropriate time' in accordance with the British Standard. It is proposed that if permission is granted then the condition will be adhered to in a formal acoustic impact assessment.
55. Whilst the acoustic report is dated June 2018, it is a critical analysis of the EHO report. It is unclear exactly what independent assessment was conducted, when it took place and what uses were operational at the time. The EHO reports that the noise limiting device was installed at the time of monitoring and still reported excessive noise emissions from the appeal premises rather than any other property. There appears to be a direct conflict in professional views.
56. The appellant has not as part of these appeals submitted any updated data or report since dismissal of their application when the report was considered. The technical evidence in support of the use is simply too vague for reliance to be placed upon it. To my mind it is too late for a noise impact assessment to be conducted once permission has already been granted with the risk that suitable mitigation measures cannot be achieved.
57. On the information before me, I cannot be satisfied that noise and disturbance caused by the mixed use of the premises can be controlled to acceptable levels, including through the use of conditions. As such, the use is contrary to policies LP2 and LP16 of the Fenland Local Plan, 2014. Amongst other things, these policies seek to promote high levels of residential amenity and protect against adverse impacts on the amenity of neighbours with regard to noise. There is also conflict with the general aim within Paragraph 127f) of the National Planning Policy Framework to create places that promote health and well-being with a high standard of amenity for existing and future users.

Conclusion on ground (a) and the deemed planning application

58. For the reasons given above, and having had regard to all other matters raised, I conclude that the appeal on ground (a) and the application for deemed planning permission must fail.

Appeals A & B - ground (f)

59. The ground of appeal is that the steps required by the notice to be taken are excessive.
60. Section 173 of the Act indicates that there are two purposes which the requirements of an enforcement notice can seek to achieve. These are either to remedy the breach of planning control which has occurred (section 173(4)(a)), or to remedy any injury to amenity that has been caused by the breach (section 173(4)(b)). It is firstly necessary to establish the purpose of the notice.
61. In its statement the Council refers to how the appellants' suggestions will not 'resolve the breach or its impact' indicating that it intended to achieve both purposes. The requirements to cease the unauthorised use in its entirety is consistent with an intention to remedy the breach. The notice itself also identifies significant noise and disturbance impacts on existing residential occupiers within the vicinity indicating injury to amenity. The notice is therefore directed at both purposes.
62. It is argued that the first floor of the building has been used as a nightclub for a number of years with no significant issues. From the history of complaints, I am not sure if that is wholly correct. Nevertheless, the appellants say it would be excessive to apply the notice to that part of the building.
63. If I were to vary the notice to require the nightclub use to cease on the ground floor only then this would have consequences under section 173(11) of the Act. Unconditional planning permission would be deemed to be granted once the remaining requirements have been complied with and the other unauthorised uses have ceased. That would not be an acceptable outcome as it would allow the nightclub to operate on the first floor free from any planning restrictions including opening times.
64. There is a ground (a) appeal under Appeal A which allows consideration of the possibility of granting planning permission for part of the matters alleged or any part of the land to which the notice relates under section 177(1) of the Act. The permission that may be granted is any planning permission that might be granted on an application under Part III of the Act.
65. The use enforced against is a single mixed use comprising restaurant/bar/nightclub and snooker hall. The Council fears that the snooker tables could be removed, but if that were to happen there would in all likelihood be another material change of use. I have considered whether a split decision could be issued for the first floor only. There are greater powers available to me with grounds (a) and (f) combined, but only to the extent that the alternative proposal relates to the matters stated in the enforcement notice or part thereof. Not all components of the mixed use are taking place on the first floor. There was no nightclub use of the first floor when the notice was issued.
66. What is sought does not constitute part of the development enforced against. The proposal is for a different development whether as a nightclub forming part of a mixed use confined to the first floor or without some/all the other components. Even if I were to consider a use under Appeal A involving a nightclub on the first floor only, there is insufficient technical evidence on

- whether noise attenuation measures can be resolved for me to be satisfied that the injury to amenity could be addressed as already discussed on ground (a).
67. In addition, the appellants submit that the ground floor could be sufficiently insulated and fitted with sound limiting devices without causing the harm identified in the notice. They suggest this is achieved through a unilateral undertaking made under section 106 of the Act. No such deed has been submitted and so I cannot take that suggestion any further. In any event, consideration has already been given to a mixed use with nightclub on the ground floor under ground (a). It would be inappropriate to grant permission on Appeal A for a use of the ground floor only by seeking to impose conditions to address the harm when I cannot be satisfied if any mitigation measures would be effective to protect against noise and disturbance.
68. As an alternative to the above, the appellants suggest the building could be divided into two separate planning units with the notice relating only to one. That is no different in practical effect from the two alternatives already considered for a use involving a nightclub. I have considered whether permission could be granted on Appeal A for a mixed use of snooker hall, restaurant and bar on the first floor only which was the use I observed taking place in that part of the building. It is not a possibility sought by the appellants and I am mindful that it is unclear if this more limited use would still give rise to noise implications and how they might be controlled.
69. In the event that all other arguments fail the appellants say the limitation should only reasonably relate to the use of the ground floor as a nightclub and not as a restaurant. They argue that any restriction on the use of the bar should relate only on the late night use and the playing of music. It is not altogether clear, but I take this to mean that the appellants wish to be able to use the ground floor as a restaurant/bar. Again, that is a different use which falls outside the scope of what can be achieved under section 177(1). Moreover, the planning consequences have not been assessed. If the owners wish to pursue this option then a new planning application would need to be submitted.
70. Consequently, there is no obvious alternative scheme that would overcome the planning difficulties. None of the proposals would remedy the breach. Given that the notice does no more than seek to achieve the purposes of section 173(4)(a) and (b), it is not excessive.
71. Nonetheless, whilst an appeal has not been brought on ground (g) I shall extend the period of compliance from 3 months to 6 months to allow time for alternative options to be explored with the Council through the submission of a planning application. In doing so, I emphasise this does not mean any of the options mooted are acceptable. That remains a matter for determination by the local planning authority should any application be made.
72. The appeals on ground (f) fail.

KR Seward

INSPECTOR