



Appeal Decisions

Site visit made on 20 August 2020

by J A Murray LLB (Hons), Dip.Plan Env, DMS, Solicitor

an Inspector appointed by the Secretary of State

Decision date: 02 September 2020

Appeal A: APP/B3030/C/20/3249587

Land at 32 King Street, Southwell, NG25 0EN

- 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 Paul McCarroll against an enforcement notice issued by Newark & Sherwood District Council.
 - The enforcement notice was issued on 28 February 2020.
 - The breach of planning control as alleged in the notice is without planning permission, 'development' consisting of the material change of use of a building from a hairdressers/barbers (use class A1 – Shops) to a composite use as a hairdressers/barbers (A1) and drinking establishment (Use Class A4).
 - The requirements of the notice are:
 - A. Cease the material change of use of the building as a composite use as a hairdressers/barbers (A1) and drinking establishment (Use Class A4); and
 - B. Operate the building solely as an A1 (shops) use.
 - The period for compliance with the requirements is 62 days after the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B: APP/B3030/W/20/3249591

Land at 32 King Street, Southwell, NG25 0EN

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr Paul McCarroll against the decision of Newark & Sherwood District Council.
 - The application Ref 19/01780/FUL, dated 27 September 2019, was refused by notice dated 2 March 2020.
 - The development proposed is described in the application as "change of use from A1 Use to Mixed Use - A1 and A4."
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Decisions

Appeal A: APP/B3030/C/20/3249587

1. It is directed that the enforcement notice be:

- (i) corrected in section 2 by the deletion of the description of the land to which the notice relates and substitution of:

"The ground floor premises at 32 King Street, Southwell, NG25 0EN, shown hatched on the attached Plan A (the Land)"
- (ii) corrected in section 3 by the deletion of the description of the breach and substitution of:

“Without planning permission, the material change of use of the Land from a hairdressers/barbers (Use Class A1 – Shops) to a composite use as a hairdressers/barbers and drinking establishment”;

- (iii) varied in section 5 by deleting requirements A and B and substituting:

“Cease the use of the Land as a drinking establishment”; and

- (iv) varied in section 6 by deleting “A and B”.

Subject to these corrections and variations the appeal is allowed and the enforcement notice is quashed.

Appeal B: APP/B3030/W/20/3249591

2. The appeal is allowed and planning permission is granted for the change of use of the ground floor premises at 32 King Street, Southwell, NG25 0EN from a hairdressers/barbers (Use Class A1) to a mixed use as a hairdressers/barbers and drinking establishment in accordance with the terms of the application, Ref 19/01780/FUL, dated 27 September 2019, and the plans submitted with it, subject to the following conditions:

- 1) The use hereby permitted shall not be open to patrons or customers outside the following hours:
09:00 – 21:30 Mondays - Fridays
08:30 – 21:30 Saturdays
12:00 – 16:00 Sundays
- 2) The premises shall not be open to patrons or customers as a drinking establishment unless they are also open to customers as a hairdressers/barbers.

Application for costs

3. An application for costs was made by Mr Paul McCarroll against Newark & Sherwood District Council in respect of both appeals. This application is the subject of a separate Decision.

APPEAL A

The enforcement notice

4. Although I am quashing the notice, I am first required to get it in order. Section 2 of the notice says it relates to “Land at 32 King Street...” but the allegation and requirements refer to the material change of use of “a building” and “the building” respectively, without defining that building. The appellant presumes and the Council confirms the notice relates to a part of the building, namely the ground floor, the first floor being separately occupied as a residential flat. Indeed, I note from a letter from the occupier of the flat that it is known as 32A King Street. No misunderstanding has arisen, but the notice ought to be corrected to more clearly describe the land affected and indeed the Council invites this. I am satisfied that this correction can be made without causing any injustice.
5. Although this point has not been addressed by the parties, the reference in the allegation to a composite class A1/A4 use is inappropriate. As a mixed use, the

alleged use would not fall within any Use Class. It should simply be described as a composite use as a hairdressers/barbers and drinking establishment and again, I am satisfied that this correction can be made without causing injustice.

6. Although issues with the requirements of the notice come within the scope of ground (f), it is appropriate to get the notice in order, so I will address them now. As far as requirement 'A' is concerned, as there is no objection to the hairdressers/barbers use, the notice can merely require cessation of the use as a drinking establishment. This change can be made without causing injustice. Requirement 'B', to operate the building solely as an A1 shop is excessive because, on the face of things it could prohibit other lawful uses, or as yet unsubstantiated future breaches of planning control. If further changes occurred, which required planning permission, enforcement action could be taken. Accordingly, deletion of requirement 'B' will not cause injustice. This necessitates a consequential amendment to the time for compliance section 6.

Ground (e)

7. This ground will succeed if copies of the notice were not served as required by s172 of the 1990 Act. However, by s176(5), where a person has not been served as required, this may be disregarded if neither the appellant nor that person has been substantially prejudiced by the failure to serve him.
8. Section 172 requires service of an enforcement notice on the owner and occupier of the land and any other person having an interest in the land, being an interest which, in the opinion of the authority, is materially affected by the notice. Albeit with some technical criticisms, the appellant accepts that he was served and of course he has been able to appeal.
9. The appellant is the occupier of the appeal property and has an interest under a lease for which he says he pays a full market, or "rack rent." He indicated in the certificate on the 2019 planning application (the subject of appeal B) that the appeal property was owned by others and, although he did not name them, he gave their address. The appellant has now named the freehold owners in his appeal statement.
10. Having regard to s336(1) and the appellant's evidence that he pays a rack rent, the freeholders are the owners for the purposes of s172, as well as having an interest materially affected. The Council does not dispute this but asserts that the notice was "issued upon" each of the parties required to be served. However, it provides no evidence regarding service and, on its face, the notice indicates that it was simply served on the appellant and "any owner/occupier" at 32 King Street.
11. There is no evidence from the Council that it could not ascertain the name of the owner after reasonable inquiry. The Council does not indicate what if any inquiries were made. The appellant says he was not served with a Planning Contravention Notice requesting details of the owners, though this information would have been available through a Land Registry search anyway and their address was given on the planning application.
12. The methods of service are prescribed by s329. There is no evidence that the notice was: delivered to the owner; delivered to, left at or sent by prepaid registered letter or recorded delivery to their usual or last known place of abode, registered principal office, or any other address given for service; or

that it was sent electronically to any address given for that purpose. On the evidence, I am satisfied that the notice was not served on the owner as required by s172.

13. Whilst the appellant has submitted a fully detailed appeal, and notwithstanding the existence of the linked s78 appeal, the failure of the enforcement appeal might affect the appellant's ability to pay rent to the owner. For that reason alone, I cannot conclude that the apparent lack of opportunity for the owner to pursue an appeal did not substantially prejudice the owner. In addition, if the notice were upheld and not complied with, the owner would be liable to prosecution, even if they were unaware of the notice, so long as it were on the statutory register of enforcement notices. This reinforces my conclusion that there would be substantial prejudice and the appeal therefore succeeds on ground (e) and the notice will be quashed, following correction. The remaining grounds of appeal against the notice do not then fall to be considered.

APPEAL B

Background and procedural matters

14. Notwithstanding the description in the application and notice of refusal, for the reasons set out in my decision on appeal A, the development should be described as the change of use from a hairdressers/barbers (Use Class A1) to a mixed use as a hairdressers/barbers and drinking establishment. That use had already commenced when the application was submitted.
15. Through grounds (b) and (c) in the enforcement appeal, the appellant argued that no planning permission was required on the basis that the drinking establishment element is merely ancillary or incidental. However, as I have quashed the notice on ground (e) that argument was not considered. Furthermore, it is not for me to determine that issue in this s78 appeal. I must decide the appeal on the planning merits, but if planning permission is not required, my decision will not affect that.
16. For the avoidance of doubt and as discussed under appeal A, the appeal property should be described as "the ground floor premises at 32 King Street, Southwell, NG25 0EN."

Main Issue

17. The main issue is the effect of the use of the premises as a hairdressers/barbers and drinking establishment on the living conditions of neighbouring residential occupiers in terms of noise and disturbance.
18. The refusal notice specifically refers to the occupiers of the first floor flat above. The Council's statement mentions "two close residential properties", but only specifically identifies the flat above the appeal premises. Nevertheless, from my site inspection, I note that there may be residential flats above the adjoining sweet shop and optician's premises.

Reasons

19. As the site lies within a designated District Centre, the Council accepts that the use meets with the aims of maintaining the primary shopping frontage whilst also having a positive impact upon the viability and vitality of the District Centre by introducing a further use of the site that maintains the vitality

throughout 'normal business hours' and then continuing into the evening. The Council therefore accepts that it accords with Policy DM11 of the Newark & Sherwood Local Development Framework Core Strategy & Allocations Amended Core Strategy (CS), adopted March 2019. However, this is subject to CS Policy DM5, which indicates that new development which creates an unacceptable level of amenity will be resisted. This in turn is consistent with paragraph 127 of the National Planning Policy Framework (the Framework). Policies DM11 and DM5 comprise the most relevant and important development plan policies relating to this appeal.

20. Whilst there is no dispute that the hairdressers/barbers use is lawful, it is not subject to a specific planning permission. Accordingly, although the appellant has provided details of the pre and post Covid-19 opening hours, there is no planning condition to formally restrict those hours. On the other hand, the drinking establishment/bar element is the subject a premises licence, granted by the Council, which currently restricts the bar opening hours to 12:00 to 21:30 Monday to Sunday.
21. The appellant indicates that, whilst the bar serves drinks to customers who are not having their hair cut, as well as to those that are, the bar is only open when the hairdressers/barbers is also open for business. The premises are never used exclusively for bar activity.
22. The appellant's evidence is also that, in general, the peak of bar customers who are not getting their hair cut occurs between 19:45 and 21:00 on Friday and Saturday. He says an average of 15 to 20 customers may use the bar on each of Friday and Saturday evening, compared to about 80 customers who get their hair cut on a Friday and around 70 on a Saturday. The appellant says the peak of bar customers not getting their hair cut relates to 2.5 hours per week compared to 60.5 hours of overall opening. Although these figures are approximate and could be subject to change, there is no evidence to contradict them.
23. As the application plan PMCC/01 Rev B shows and my site inspection confirmed:
 - The hairdressers/barbers and bar share a common access, counter/bar, till and WC;
 - The bar is within the barbers' area and forms the payment counter for the barbers;
 - There is no physically separate area defined as the bar;
 - The bar uses the same tables and chairs as the waiting area for the barbers (although, at the time of my visit, there were also 4 bar stools at the counter).
24. The Council considers that the bar use will cause more noise than the hairdressers/barbers. It is concerned that the appellant has not complied with requests to submit noise surveys/reports to demonstrate that the use would not result in an unacceptable level of noise.
25. However, the application was retrospective and indicated that the use has been operating since September 2018, a date broadly confirmed by the residential occupier of the first floor flat above. There has therefore been an opportunity to

- test the impact. A letter from the occupier of the flat above indicates that, since the use commenced, he has had no concerns about noise. Furthermore, he does not want strangers in his flat to undertake what he considers to be an unnecessary noise survey.
26. A letter from another neighbour, who the appellant says lives four doors away from the appeal property, does refer to noise from this use affecting residents, including from anti-social behaviour and drinking in the street. She also refers to a "Noise Abatement Order" being served by the Council in October 2019. However, this neighbour was concerned that the application would result in the premises becoming a "full-blown bar with potential to become a nightclub." Subject to suggested conditions, she said she hopes the appellant will be able to "continue running a successful barber's shop and early evening bar." Among other things, she suggested the licensing hours be restricted to 21:30, 7 nights per week. The Town Council objected on the basis of noise but provided no details. The Southwell Civic Society objected to unlimited hours and the Council's Environmental Health Officer suggested conditions.
27. The Council's statement does not refer to the noise abatement notice and neither does the Environmental Health Officer's consultation response. The appellant's unchallenged account is that the abatement notice was served in October 2019, but was withdrawn in January 2020, shortly before the relevant legal proceedings in the Magistrates Court. He says the Council's Environmental Health Department accepted that the instances of alleged noise nuisance relied upon in the notice in fact occurred when the premises were closed. Furthermore, noise surveys undertaken at the complainant's property only determined the background noise present from traffic, the three nearby takeaway restaurants and a nearby pub.
28. Notwithstanding the circumstances which led to the withdrawal of the abatement notice, the Council did not reconsult before issuing the enforcement notice and refusing the planning application in February and March 2020 respectively.
29. Whilst the concern that a drinking establishment could generate noise is easily understood, this use has been operating for some time and the evidence does not indicate on the balance of probability that this use has resulted in unacceptable noise for neighbouring occupiers. It is possible that the occupier of the flat above is exceptionally tolerant, but I attach significant weight to the fact that he has no concerns about noise and considers a noise survey unnecessary. I have seen no objections from other adjacent neighbours.
30. Subject to any restriction on operating hours, it is possible that the bar could become busier, but the premises are small and there is very limited scope for expanding the bar use whilst retaining the hairdressers/barbers use in the mix. If the bar use displaced the hairdressers/barbers use, that would most likely involve a material change requiring planning permission; allowing this appeal would not lead to the premises becoming a "full-blown bar with potential to become a nightclub." That said, the appellant states that the bar use never operates when the hairdressers/barbers is not also open for business. A condition could reasonably require this to further limit the extent of the bar use, in the interests of neighbours' living conditions.
31. On the subject of opening hours, the evidence that the hairdressers/barbers and drinking establishment use has not caused any unacceptable noise for

neighbouring residents must be seen in the context of the appellant's evidence that it has not operated after 21:00 in the evening on any day and it has been closed on Sundays.

32. I conclude on the main issue that, subject to conditions concerning opening hours and preventing operation of the bar alone, the use of the appeal premises as a hairdressers/barbers and drinking establishment will not have any unacceptable impact on the living conditions of neighbouring residential occupiers in terms of noise and disturbance. I therefore find no conflict with CS Policy DM5.

Conditions

33. Given my findings concerning the actual experience of noise generated by the operation of this use since September 2018 a condition requiring the submission of a noise assessment is unnecessary. For the same reason, and even though the appellant does not object to these in principle, I am not persuaded that conditions requiring the installation of self-closing door mechanisms and acoustic baffles are necessary.
34. I have already indicated that a condition preventing the opening of the bar in isolation is needed. Furthermore, the fact that the premises have not been opening late into the evening may have been an important factor in limiting any disturbance through noise. I note that, although the hairdressers/barbers use has not been subject to any formal restriction on opening hours, the current premises licence only allows the bar to operate between noon and 21:30, albeit 7 days a week.
35. The Planning Practice Guidance advises that conditions which require compliance with other regulatory regimes will not meet the test of necessity and may not be relevant to planning. However, a planning condition which specifies hours of operation, is not one which simply requires compliance with other regulatory regimes.
36. The appellant says an opening hours condition is unnecessary because the premises licensing regime allows the Council to consider relevant matters that relate clearly to the licensing objectives, namely: the prevention of crime and disorder; public safety; prevention of public nuisance; and the protection of children from harm. The licensing regime, along with the noise abatement notice system under the Environmental Protection Act 1990, should be able to address potential issues of anti-social behaviour, as described by the neighbouring objector to the planning application.
37. However, the prevention of "public nuisance" or statutory nuisance is not the same as the legitimate planning objective of safeguarding acceptable living conditions for neighbouring occupiers. Noise falling short of a public or statutory nuisance may nevertheless cause unacceptable harm to a neighbour's living conditions. In order to safeguard living conditions, I am satisfied that an opening hours condition is necessary, relevant to planning and relevant to the use to be permitted.
38. Whilst other, indeed longer hours have been suggested, subject to what I have to say about Sundays, it is reasonable to specify a closing time equivalent to that on the premises licence, namely 21:30. The appellant's evidence is that the business has never opened after 21:00. Similarly, the evidence is that it

has never opened before 09:00 Monday to Friday and 08:30 on a Saturday. The lack of complaints from immediate neighbours must be seen in that context. They could reasonably expect a quieter environment outside these times, and I will impose them to safeguard neighbours' living conditions.

39. When concluding that neighbours have not suffered unacceptable levels of noise, I also noted the fact that the business has not opened on a Sunday and so it is reasonable to maintain tighter controls on Sundays, when more people are likely to be at home. The premises licence does not prohibit Sunday opening, but the 12:00 to 16:00 Sunday opening hours suggested by the Council are reasonable and I will adopt them.
40. I see no need to specify operating hours for the bar use in isolation from the hairdressers/barbers element. The premises licence currently prohibits the bar use before 12:00. However, I am less concerned about the impact on neighbours, in terms of noise and disturbance, of activity between 08:30 and 12:00 in this busy District Centre location.
41. The Council suggests a condition restricting the playing of amplified music outside specified hours, but I see no need for that in addition to the opening hours restrictions. I also note that the hairdressers/barbers business has been able to play music without any planning restrictions.

Overall conclusion and planning balance

42. Subject to the conditions referred to, I find that the use of the premises as a hairdressers/barbers and drinking establishment will not cause unacceptable harm to the living conditions of neighbouring residential occupiers in terms of noise and disturbance. It therefore complies with CS Policies DM5 and DM11 and there is no conflict with the Framework. I conclude that the use complies with the development plan as a whole and no material considerations indicate that planning permission should not be granted. I will therefore allow the appeal.

J A Murray

INSPECTOR