



Appeal Decision

by Jessica Graham BA(Hons) PgDipL

an Inspector appointed by the Secretary of State

Decision date: 7 September 2020

Appeal Ref: APP/X1118/C/19/3237425

The Ring O' Bells, Prieford, Barnstaple, Devon EX31 4DX

- 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 Philip J Milton Construction and Maintenance Ltd against an enforcement notice issued by North Devon District Council.
- The enforcement notice was issued on 23 August 2019.
- The breach of planning control as alleged in the notice is: *Within the last 4 years, unauthorised material change of use consisting of the residential use of a public house.*
- The requirements of the notice are to:
 1. *Cease the use of the residential use of [sic] the public house buildings and the land edged red on the attached location plan.*
 2. *Remove the kitchen and cooking facilities from the residential unit known as The Apartment.*
- The period for compliance with the requirements is nine 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.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with correction and variation.

Preliminary matters

The grounds of appeal

1. The appeal form submitted by the Appellant on 18 September 2019 indicated that the appeal was brought on ground (c): that is, that there has not been a breach of planning control. However, the statement which accompanied the appeal form indicated that ground (d) was at issue (that is, that at the time the enforcement notice was issued, it was too late to take enforcement action against the matters stated in the notice). In response to a letter from the Planning Inspectorate requesting clarification, the Appellant confirmed that the appeal is made on ground (d).

Appeal procedure

2. The Planning Inspectorate initially made arrangements for the appeal to be determined following a site visit, which was scheduled for 31 March 2020. That event could not take place given the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 ("the Coronavirus Restrictions") and related guidance.
3. As the appointed Inspector, I reviewed the file to assess the optimal procedure for the appeal. I considered that it could be determined without the need for a site visit. In summary, this is because there is no appeal made on ground (a)

(that is, that permission should be granted for the matters alleged) so the planning merits of the contested development are not at issue. This means that matters such as its impact on the character and appearance of the area, or any community benefits of retaining the building as a Public House, are not before me (as they would have been if a grant of planning permission were sought). Further, the key area of dispute between the parties is the timing of the alleged material change of use, and flowing from that, whether the time for taking enforcement action has lapsed. Determining the relevant dates will depend on an evaluation of the evidence as to events which occurred several years ago, and a site visit to inspect the current layout and physical state of the building would not assist with that assessment.

4. The Appellant and the Council were contacted on 2 July 2020, and confirmed their agreement that the appeal be determined without a site visit. I have proceeded on that basis.

The appeal on ground (d)

5. The ground of appeal is that at the date when the notice was issued, it was too late for the Council to take enforcement action against the alleged material change from a public house to residential use. The burden of proving relevant facts lies with the Appellant. So to succeed on ground (d) the Appellant would need to show that, on the balance of probabilities, the residential use began more than four years before the notice was issued and continued, without material interruption, for a period of four years thereafter.

The planning unit

6. In order to determine whether and when a material change of use has taken place, it is first necessary to ascertain the correct planning unit, and the present and previous primary (as opposed to ancillary) uses of that unit. Case law¹ has established that the planning unit is usually the unit of occupation, unless a smaller area can be identified which is physically separate and distinct, and/or occupied for different and unrelated purposes. In this case, the Council and the Appellant consider that the relevant planning unit is the Ring O' Bells in its entirety, and I agree with that assessment. The established use of the premises, which began in the early 19th Century, is as a public house; the bar is located on the ground floor, with living accommodation upstairs.
7. The Appellant rightly points out that there was, and is, no formal "tie" restricting the occupation of the upstairs living accommodation to those working in the pub downstairs. However, there is no evidence to suggest that the living accommodation has, at any time prior to the date at which the Ring O' Bells ceased trading, been occupied for any purpose that was not in some way associated with the primary use of the premises as a Public House. The implementation of planning permission granted in 2004² for the change of use of "staff bedrooms (east wing) to form 3 letting rooms" did not result in any subdivision of, or change to, the planning unit because the terms of the permission made it clear that the letting rooms were to be used "in association with Public House".
8. It is therefore clear that up until the Public House closed for business on 8 April 2012, the lawful use of the planning unit was as a public house. This was its

¹ *Burdle and Williams v SSE & New Forest DC* [1972] 1 WLR 1207

² Ref 37311, 21 May 2004

primary use. The residential accommodation provided on the first floor was used for purposes ancillary to the achievement of that purpose: that is, as the owners' residence and (until Mr and Mrs Squire decided to stop letting rooms commercially in 2008) for the provision of B&B accommodation.

The material change of use

9. The concept of "material change of use" is not defined in statute or statutory instrument; it is a question of fact and degree in each case. For there to be a material change of use, there needs to be some significant difference in the character of the activities from what has gone on previously. In this case, there is no dispute that the current primary use of the planning unit is residential (as it was on the date that the enforcement notice was issued), and that this constitutes a material change from the previous primary use of the unit as a public house. The point at issue is how to date the material change of use.
10. The Appellant's case is that a material change of use occurred when the Ring O' Bells ceased trading as a pub on 8 April 2012, because after that date, the residential use became the main use. The Council contends that the material change of use at which the notice is directed did not take place until after the Appellant's purchase of the premises in September 2015; its case is that the use made of the premises by the Squire family after 2012 did not amount to a material change of use or, if it did, that this unauthorised use did not continue unbroken for a sufficient period to achieve immunity from enforcement.
11. Looking at the evidence provided, the reason why the Ring O' Bells ceased trading as a public house in April 2012 is not entirely clear. The Appellant contends that the pub was no longer viable, but this is not mentioned in the "Statement of Fact" from Mr and Mrs Squire (which is dated 2 September 2019, but is not signed). The Statement of Fact does, however, describe the manner in which the Squire family occupied the accommodation. Following their purchase of the Ring O' Bells in December 2007, Mr and Mrs Squire and one of their children occupied "the larger half of the Owner flat with the kitchen and bathroom", and their other child occupied "the smaller half of the Owner flat with only two rooms". The first-floor accommodation that was used for B&B was known as the Blue Room (marketed as a family room) and the Red Room (marketed as a double room).
12. The Statement of Fact goes on to say that, having realised B&B was "not a worthwhile avenue" to follow, "...at the end of 2008 we spread ourselves out and used all of the upstairs area." After closing the pub in 2012 the family "made the most of the extra space"; the office store was used for motorbikes and accessories, the restaurant areas for art projects, and family gatherings were held in the bar area.
13. The difficulty in establishing whether or not the primary use of the planning unit changed in April 2012 is that there is no clear evidence as to whether or not the closure of the public house was, at that time, intended to be temporary or permanent. It would, after all, be a relatively straightforward matter to remove motorbikes from the office store and art projects from the restaurants to facilitate the re-opening of the pub. The Statement of Fact is silent as to Mr and Mrs Squire's intentions, realised or otherwise, for the property. It does however state that upon closing in April 2012 "we made our own family redundant", and that in June 2014 Mr and Mrs Squire moved out to take up a live-in position in North Devon.

14. In my judgment, based on the limited evidence available, the reference to redundancy as of April 2012 indicates that the Squires regarded the closure of the public house as a long-term rather than temporary measure; it also seems more likely than not that any possibility of the family re-opening the public house ceased when Mr and Mrs Squire moved out to take up work elsewhere in June 2014. I therefore consider that on the balance of probabilities, there was a material change in the use of the planning unit when the pub closed in April 2012. The residential use of the first-floor living accommodation ceased to be ancillary to the use of the premises as a public house, and instead became the primary use of the premises.

Continuity of unauthorised use

15. However, that is not the end of the matter. S.171B(2) of the Act provides that no enforcement action can be taken after the end of the period of four years "beginning" with the date of the breach – rather than "ending" with the date of issue of the notice. In other words, the unauthorised use must continue for a four year period before it can achieve lawfulness. Minor interruptions of the use, such as short suspensions during a change of ownership or period of illness, will not usually stop the period running, but in each case it will be a matter of fact and degree whether an interruption in activity on the ground has resulted in the cessation of the use such that no enforcement action could be taken against it during that period. In that event, the resumption of the unauthorised use would constitute a fresh breach of planning control, and the four year period would restart from zero.

16. In this case, the evidence is that the Squires had ceased all residential use of the premises by February 2015, at which point they "handed the keys to the Estate Agent". This means that the breach of planning control constituted by their use of the planning unit for residential purposes, after the pub had closed, lasted from April 2012 to February 2015: a period of some 2 years and 10 months. The Ring O' Bells then stood unoccupied and unused between February 2015 and 30 April 2016, a period of non-occupation in excess of a year, and clearly more than *de minimis*.

17. The Appellant bought the property on 28 September 2015, and has explained that this was with the intention of providing residential accommodation on the first floor, in the same configuration as that occupied by the Squire family: the delay between purchasing the property and its first occupation by a tenant was due to necessary repairs and maintenance taking longer than expected. However, case law³ has established that where (as here) there has been an unauthorised change of use and there is then a break in that use before any accrued planning right has arisen, neither the intention of the owner, or the suitability and availability of the property for residential accommodation, is decisive. The relevant question to ask is: could the Council have taken enforcement action during the period when the use was inactive?⁴

18. In this case, the answer is that it could not. On the basis of my finding above, it would have been possible (whether or not it would have been expedient is a different matter) for the Council to have taken enforcement action against the

³ *Thurrock BC v SSETR & Holding* [2002] EWCA Civ 226; *Swale BC v FSS & Lee* [2006] JPL 886

⁴ This is a very different question to whether a break in continuity approaches the abandonment of an existing use, which is (as I understand it) the test advocated by the Appellant. That applies in cases where the material change of use had already achieved immunity from enforcement prior to the break in question, but here, it had not.

residential use made of the premises by the Squires after the pub had ceased to trade. But when they vacated the premises in February 2015, their residential occupation ended and there was no longer any breach of planning control. While the Appellant contends that the Council was “well aware” of his intention to use the first-floor living accommodation for residential letting, the Council does not have the authority to issue an enforcement notice in respect of a potential unauthorised use which may take place in the future. In short, the Council could not have taken enforcement action between February 2015 and April 2016 because no actual use was being made of the premises which was in breach of its lawful use as a public house.

Conclusion on ground (d)

19. I find that when the first of the tenancies let by the Appellant commenced on 30 April 2016, this did not amount to the continuation of the breach of planning control that occurred in April 2012. Rather, that first period of residential use had ceased before it gained immunity from enforcement, and there then followed a period of some 14 months during which no active use of the premises, residential or otherwise, was being made and the Council could not have taken enforcement action. The commencement of the tenancy on 30 April 2016 amounted to a fresh breach of planning control, consisting of the residential use of the first-floor living accommodation that was wholly unconnected with any use of the Ring O’ Bells as a public house. Applying the test at s171B(2), this took place less than four years before the date on which the enforcement notice was issued.
20. For these reasons, I conclude that the notice was issued within the statutory time limit for taking enforcement action. The appeal on ground (d) must therefore fail.

Other matters

The requirements of the notice

21. The terms of the first requirement of the notice give rise to two concerns. The first is the presence of what is most likely a typographical error, in that it states “Cease the use of the residential use of...”. The intended meaning is nevertheless clear, so the syntax can be corrected to “Cease the residential use of...” without any question of injustice arising to either the Appellant or the Council.
22. The second, more substantial, concern is that the terms of this requirement may in operation exceed what is necessary to remedy the breach of planning control in this case. That is because the established lawful use of the premises is a public house, with ancillary living accommodation on the first floor. The requirement as drafted specifies the cessation of “residential use” which, notwithstanding the provisions of s.57(4) of The Act ⁵, could be interpreted as preventing any residential use whatsoever including, if the pub re-opened, the legitimate use of the first-floor living accommodation for residential purposes ancillary to the primary use of the property as a public house.

⁵ S.57(4) provides that *where an enforcement notice has been issued in respect of any development of land, planning permission is not required for its use for the purpose for which (in accordance with the provisions of this Part of this Act) it could lawfully have been used if that development had not been carried out.*

23. In order to prevent any such misunderstanding, I shall amend the terms of the requirement to specify that the residential use which must cease is such residential use as is unconnected with the use of the premises as a pub. I am satisfied that this will cause no injustice to either the Council or the Appellant. The notice will still achieve its intended aim of preventing any unauthorised residential use of the property, and the Appellant's right to use the first-floor living accommodation for purposes ancillary to the operation of the public house will be safeguarded.

The existing tenants

24. There is evidence that there are currently two separate households occupying the first-floor living accommodation at the Ring O' Bells. In circumstances where anyone stands to lose their home as the result of an appeal decision, as is the case here, there is likely to be a serious interference with their rights under Article 8 of the European Convention on Human Rights (ECHR) as enacted through the Human Rights Act 1998 (HRA). However, it does not necessarily follow that this would be a violation of their human rights.

25. Subject to the amendment described at paragraph 23 above I am satisfied that the requirements of the notice are not excessive, and the amount of time given to comply with them is adequate (I note that since no appeal has been made on grounds (f) or (g), this is not disputed by the Appellant). In terms of the HRA I find that the requirements of the enforcement notice are not a disproportionate remedy when balanced against the need to uphold the operation of the planning system, which includes the requirement for development to accord with the planning policies of the Council's adopted Development Plan; that being made and applied in the wider public interest.

26. The Appellant has provided a detailed commentary on the actions taken by the Council during the course of its enforcement investigation, and the impact these had upon the tenants of the property. Those actions cannot have any bearing on my determination of the appeal, although it is of course open to the Appellant to pursue his concerns through the appropriate channels. One matter that is however of relevance to my decision is that one of the existing occupiers has a "relevant protected characteristic" for the purposes of s.149(1)(b) and (c) of the Equality Act 2010.

27. I have therefore had due regard to the Public Sector Equality Duty (PSED) contained in that section of the Equality Act, which sets out the need to eliminate unlawful discrimination, harassment and victimisation, and to advance equality of opportunity and foster good relations between people who share a protected characteristic and people who do not share it. I appreciate that the level of stress and anxiety occasioned by being served with notice to vacate the property could have a greater impact on the person with this protected characteristic. I have considered possible steps to address that inequality, but have found no alternatives that would be both appropriate to the circumstances and less harmful in impact. Weighing all of the relevant considerations in the balance, I consider that upholding the notice is proportionate.

Conclusion

28. For the reasons given above I conclude that the appeal against the enforcement notice should not succeed. I shall uphold the notice with correction.

Formal Decision

29. It is directed that the enforcement notice be corrected by:

- at paragraph 6 requirement 1, between the word "Cease..." and the phrase "...the residential use of...", deleting the words "the use of"

and varied by:

- at paragraph 6 requirement 1, replacing the final full stop with a comma, and adding thereafter the words "other than for purposes ancillary to the primary use of the premises as a public house."

Subject to this correction and variation, the appeal is dismissed and the enforcement notice is upheld.

Jessica Graham

INSPECTOR