



Appeal Decision

Site visit made on 18 August 2020

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 09 September 2020

Appeal Ref: APP/T5150/C/19/3242727

201 Kilburn High Road, London NW6 7HY

("the premises" – shown outlined bold in BLACK on the attached plan)

- 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 Ms Anila Shyam against an enforcement notice issued by the Council of the London Borough of Brent.
 - The enforcement notice was issued on 30 October 2019.
 - The breach of planning control as alleged in the notice is: Without planning permission, the material change of use of the rear part of the premises to a shisha café/lounge.
 - The requirements of the notice are:
 - STEP 1 Cease the use of the premises as a shisha café/lounge.
 - STEP 2 Remove all items associated with the shisha café/lounge use, including the removal of the structure and retractable canopy to the rear of the premises, all materials and debris associated with the structure and retractable canopy, the chairs and tables contained under the structure and retractable canopy, and all shisha pipes, tobacco, charcoal burners and any other items associated with the shisha use, including refuse and paraphernalia.
 - The period for compliance with the requirements is 3 months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (c), (d), (f) and (g) of the Town and Country Planning Act 1990 as amended. Since an appeal has been brought on ground (a), an application for planning permission is deemed to have been made under section 177(5) of the Act.
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Decision

1. The appeal is allowed and the enforcement notice is quashed.

The Notice

2. The appellant refers to a disconnect between the description of the land or premises the subject of the notice and the plan attached to the notice. But I am satisfied, notwithstanding the address is 201 Kilburn High Road, that the notice when read as a whole specifies the precise boundaries of the land to which it relates as being shown outlined bold in black on the attached plan, ie the rear yard of 201 Kilburn High Road only or the 'terrace' as it is referred to by the appellant.
3. The notice does not identify the lawful use of the land and the appellant considers the Council has failed to correctly identify the relevant planning unit. Whilst it is essential to identify the planning unit in order to determine whether there has been a material change of use (which I shall return to later on ground (c) below), it is well established in case law that a notice does not have to identify the planning unit, nor does a notice alleging a material change of

use need to recite the previous use. So the notice is not a nullity for either of these reasons.

4. The appellant states the notice alleges a material change of use to a single primary use rather than a mixed use. But this is not a basis for determining that the notice is a nullity, it is a matter for the grounds of appeal.
5. Considering all of the above points, and as the notice contains all that is required for the purposes of section 173 of the 1990 Act as amended and Regulation 4 of The Town and Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002, I am satisfied the notice is not a nullity or invalid as is alleged by the appellant.

Ground (c)

6. In an appeal on ground (c) the burden of proof falls on the appellant to make out their case. In their grounds of appeal the appellant states that the relevant planning unit is the ground floor, basement and garden area, and that the shisha use is **ancillary** to the primary use as a restaurant. However, in their appeal statement, the appellant states that the relevant planning unit is the ground floor and basement as well as the terrace, which is in a **mixed** restaurant and shisha use.
7. The above are not compatible positions. No 201 is a four storey plus basement Victorian terraced building. The upper floors are divided into flats accessed from an entrance on the street and the ground floor and basement are in use as a restaurant, access through which is necessary to reach the yard at the rear of the building where the alleged material change of use is said to have occurred. If the shisha use is an ancillary use then a material change of use may not have occurred, whereas, if the shisha use is part of a mixed use then a material change of use may have occurred but not the use which is alleged in the notice; a point more appropriately made under ground (b) although I shall address it here. No injustice would be caused by doing so as the Council has had the opportunity to respond to the appellant's case in this regard in any event. To resolve this dispute, I must determine what is the correct planning unit and what are the present and previous primary (as opposed to ancillary) uses of that unit.
8. 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 a different and unrelated purpose. Based on all the information available to me, including my observations at my site visit, the planning unit in this case is not simply the rear yard identified on the notice. It is more likely to be the ground floor and basement of the building and its rear yard.
9. At least some of the shisha activity is carried out within the restaurant, ie shisha preparation and storage, and, patrons of the shisha use share facilities with the restaurant, such as toilets. Considering the above points, including that there is no separate access to the rear yard, the planning unit in this case is as described above by the appellant and there is a physical link between the restaurant and the area where shisha is smoked in the yard at the rear.
10. Based on the evidence available, including the significant amount of seating in the rear yard, I am not satisfied the shisha use is ancillary to the restaurant use as the appellant suggests. The Council maintains the two uses are operated

by different people and there is no evidence this is not the case. But based on the evidence available, it appears more probable than not, that there is a functional link between the restaurant and shisha smoking area. I therefore consider two primary uses have been carried out within the same planning unit of occupation, such that overall there is a mixed restaurant and shisha use rather than use as a shisha café/lounge only as alleged. The appeal therefore succeeds, albeit on the basis of an argument more relevant to ground (b).

11. As correcting the allegation to reflect a change to a mixed use would materially change the description of development for the deemed planning application and how the parties may wish to plead their cases, I cannot correct the notice in this regard without causing injustice to the parties.

Conclusion

12. For the reasons given above I conclude that the appeal should succeed on ground (b). Accordingly the enforcement notice will be quashed. In these circumstances the appeal under the various grounds set out in section 174(2) to the 1990 Act as amended and the application for planning permission deemed to have been made under section 177(5) of the 1990 Act as amended do not need to be considered.

L Perkins

INSPECTOR