



Appeal Decision

Site visit made on 22 September 2020

by Elizabeth Pleasant BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 04 November 2020

Appeal Ref: APP/N1920/C/19/3242897

Land at Potty's Diner, 2 Barnet Road, Potters Bar, Hertfordshire EN6 2QS

- 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 A Michaelides on behalf of A and D Inc Limited against an enforcement notice issued by Hertsmere Borough Council.
- The enforcement notice was issued on 15 November 2019.
- The breach of planning control as alleged in the notice is: Without planning permission and listed building consent, the erection of an unauthorised single storey building with linking canopy to the eastern side and rear of a listed building and use of same as a Shisha Lounge.
- The requirements of the notice are:
 - Permanently remove the single storey building with linking canopy from the eastern side and rear of the main Grade II listed building on the land.
 - Cease the use of the site as a Shisha Lounge.
 - Remove all debris, waste and equipment resulting from compliance with Steps 1 and 2 above from the land and its environs.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2) (a) (e) (f) and (g) of the Town and Country Planning Act 1990 as amended (the Act). 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 as amended.

Summary of the Decision: The appeal is allowed, the enforcement notice is quashed, and planning permission is granted in the terms set out below in the Formal Decision.

The Enforcement Notice

1. The appellant submits that the enforcement notice is a nullity or invalid in that it is unclear in many respects. The description of the breach is unclear, and the notice is incapable of variation without injustice to the parties involved. Furthermore, it is submitted that the Notice was not issued with the correct authority, and when issued the Council did not comply with statutory requirements set out in the Town & Country Planning (Enforcement Notices and Appeals) (England) Regulations 2002 (ENAR).
2. Turning first to the issue of whether or not the notice was issued with the correct authority. The notice was signed by the Head of Planning and Economic Development. The appellant's case is that the Council's constitution requires an enforcement notice to be issued by the Head of Planning and Building Control in consultation with legal services. In response to the appellant's claim, the Council has advised that following a restructuring of the Council's Planning Service, the Chief Executive of the Council exercised their powers in

the Council's Scheme of Delegation to sub-delegate all or any of these powers to a named officer, which in this instance is the officer who is the Head of Planning and Economic Development. It was this named officer who signed the enforcement notice. A copy of the written instructions, scheme of delegation and sub-delegation of the powers to the named officer (Head of Planning and Economic Development) has been provided. From the evidence before me I see no reason to doubt that the notice was issued without the proper authority.

3. Section 173(10) of the Act states that an enforcement notice shall specify such additional matters as may be prescribed, and regulations may require every copy of an enforcement notice served under section 172 to be accompanied by an explanatory note giving prescribed information as to the right of appeal under section 174.
4. Regulation 5 of the ENAR states that every copy of an enforcement notice served by a local planning authority under section 172 (2) of the Act shall be accompanied by an explanatory note which shall include matters specified in 5(a), 5(b) and 5(c) of the ENAR. The appellant is of the view that the Council did not meet the requirements of 5(a) and in particular, save for the inclusion of s174, a summary of ss171A, 171B and ss172-177 of the Act were not included in the explanatory note which accompanied the notice. In addition, the requested fee was not correct. The full stated sections of the Act were not included in the explanatory note. However, only a summary of those sections is necessary to provide the information set out in Regulation 5(a) (i-iv). The guidance notes which accompanied the notice clearly set out: that there is a right of appeal to the Secretary of State (SoS) against the enforcement notice (Reg. 5(a) (i)); how and by when to give notice of that appeal to the SoS (Reg. 5(a) (ii)); the grounds on which an appeal may be brought under section 174 of the Act (Reg. 5(a) (iii)); and what the required fee would be (Reg.5(a) (iv)). Regulation 5(a) does not require the summary to include anything further than the information set out in i –iv, and I am satisfied that the guidance note which accompanied the notice met that requirement.
5. It is accepted by the Council that there was an error in the notes with respect to the date upon which the notice would take effect. However, there was not an error in the enforcement notice such that would make it a nullity or invalid. Even taking into account the date stated in the guidance notes, i.e. the 13th December 2019, that date was not less than twenty-eight days after the notice was served, as required by Section 172 (3)(b).
6. As required by Reg. 5(a) (iv) of the ENAR, the Council advised the appellant that should an appeal be made under ground (a) of Section 174(2) of the Act, then a fee of £924.00 would be payable. The appellant disputes that this is the correct fee and asserts that the Council has misunderstood the breach of planning control and has therefore miscalculated the fee. The limit of the Inspector's responsibility is to verify whether or not a fee has been paid if ground (a) has been pleaded. It is not a matter for my consideration in this appeal as to what that fee should be, and in any event, this is not a matter that would make the notice a nullity or invalid.
7. It is also the appellant's case that the alleged breach of planning control is not clear and that the appellant has had to read beyond what is written in the notice in order to fully understand what the Council is alleging and what it is they are required to do once the notice takes effect. In this regard, I have had

regard to the test described in *Miller Mead v MHLG* [1963] 1 A11 ER 459, i.e. whether the enforcement notice tells the recipient "fairly what he has done wrong and what he must do to remedy it".

8. The alleged breach of planning control is: '*Without planning permission and listed building consent, the erection of an unauthorised single storey building with linking canopy to the eastern side and rear of a listed building and the use of same as a Shisha Lounge.*' The notice clearly identifies that there has been a breach of planning control which is being brought under Section 171A (1)(a) of the Act. I therefore agree with the appellant that the reference in paragraph 3 of the notice to '*without listed building consent*' is not relevant to the alleged breach and unnecessary. However, I am satisfied that the deletion of the text 'and listed building consent' from paragraph 3 would not result in any injustice to either party, as the purpose of the notice would not be changed.
9. The alleged breach identifies the precise location of the single storey building that has been erected and the requirements are clear in that they identify the same building to be removed. There is no mention of a requirement to demolish or remove any of the other buildings on the site. Furthermore, given the clear description of the location of the unauthorised building which has been erected, there is no need for this to be identified on the Plan which accompanied the notice. However, I noted at my site visit that there have been further additions to the unauthorised building since the notice was issued. These structures have been constructed from timber boarding to the eastern and southern elevations of the Shisha Lounge and include some cladding with artificial grass. These timber structures/enclosures did not form part of the original breach and are not therefore the subject of this appeal or the deemed planning application.
10. Taking into account the Council's evidence and noting that section 75(2) of the Act provides that where planning permission is granted for the erection of a building, the grant of permission may specify the purposes for which the building may be used, then it is clear to me that the breach of planning control is directed solely at the new unauthorised building which is in use as a Shisha Lounge. In addition, the description of the alleged breach of planning control does not include a material change of use of the Land. That said, the breach would be rectified by the removal of the unauthorised building and it is not therefore necessary for the requirements of the notice to require the use of the site as a Shisha Lounge to cease. I shall therefore correct the notice by deleting the second bullet point of paragraph 5. I am satisfied that this correction would not result in any injustice to either the appellant or the Council as the stated requirements in the first and third bullet points alone would rectify the alleged breach the planning control.
11. Whilst I have found that it is necessary to correct the requirements of the notice to ensure they are consistent with the alleged breach, I am satisfied that the notice, as corrected, clearly tells the recipient what he has done wrong and what he must do to remedy it. In those circumstances it is not a nullity or invalid.

Appeal on ground (e)

12. The main issue concerning the appeal on this ground is:

- a) whether copies of the enforcement notice were served as required by section 172 of the Act; and
 - b) if not, whether the appellant, or the person who was not served as required, have been substantially prejudiced by the failure to do so.
13. The main thrust of the appellant's case is that the notice was not served on the occupier and operator of the Shisha Lounge, A and D Inc Limited ('A & D'). It is pointed out that the company is a tenant of the Shisha Lounge and has use of the Outbuilding on the Land. Furthermore, the Council were fully aware that the Shisha Lounge was being operated separately to the main restaurant and should have used the powers available to them to ascertain who the occupiers were and served the notice directly on them. It is the appellant's case that given the impact of the requirements of the notice on their business they have been prejudiced by the failure of the Council to serve a copy of the notice on them.
14. The Council accept that the notice was not served directly on 'A & D'. However, in addition to the copies of the notice served on the Freeholding owners, Chris Harmanda Family Limited and the Mortgagee (as named in the Land Registry) of the site, the Council served a copy of the notice on the 'Owner/Occupier' of the Land at 2 Barnet Road, Potters Bar, EN6 2QS. A signature was obtained from a person on the site in respect of the notice issued on the 'Owner/Occupier'.
15. In serving a copy of the notice on the 'Owner/Occupier' on the site, as well as copies on the Freeholding owners and Mortgagee, indicates to me that it has been properly served. Moreover, even though a copy of the notice was not served directly on the appellant 'A & D', that has not prevented them from lodging an appeal and putting forward a full and comprehensive case in support of it. In the light of this, I am satisfied that neither the appellant nor company in question has been substantially prejudiced.
16. For the reasons given above, I conclude that the appeal on ground (e) fails.

Appeal on ground (a), deemed planning permission

Main Issues

17. The main issues in this case are:

- the effect of the development on the character and appearance of the area, including its impact on the setting of the Grade II listed building, formerly known as The Lion Public House; and
- whether or not the Shisha Lounge is acceptable in principle in this location, having regard to local planning policies and the living conditions of nearby residents.

Reasons

Character and appearance

18. The single storey building and the canopy which links it to an existing Outbuilding have been constructed on land adjacent to a Grade II listed building now known as Potty's Diner. Except for a copy of the list description, I have not been provided with any description of the significance of this heritage

asset, including any contribution made by its setting. However, taking into account the list description and my own observations on my site visit, the significance of this heritage asset is, in my opinion, largely derived from its age, historic use and architectural features, including its joinery details, quoins, cambered rubbed brick heads to the windows, and its substantial chimney stacks. Its prominent position at a road junction and open rear aspect, allow the building's dominant front façade and rear roof scape with its chimney stacks to be fully appreciated. This setting contributes to the significance of the heritage asset.

19. The surrounding area has a predominantly commercial character. However, there are no distinct local design characteristics, and the area comprises a variety of building styles and external facing materials
20. The breach of planning control alleged is a single storey building with linking canopy. The details of this building and linking canopy are shown on the drawings provided at Appendix A of the appellant's statement of case. The Shisha Lounge building is single storey and predominantly glazed. Whilst it has quite a large footprint, its simple glazed form and aluminium frame give it a lightweight appearance which is distinct and clearly subservient to the robust form of the neighbouring listed building. The existing boundary wall along Southgate Road partially screens the Shisha Lounge building and the unauthorised building's shallow pitch roof is seen as distinct and separate from the pitched roof of the original outbuilding, which remains visible and recognisable when viewed from Southgate Road. Furthermore, the building's dark colour and siting, recessed behind the rear elevation of Potty's Diner and the original outbuilding, mean that it is not visually dominant when viewed from the property's rear car park or when approaching from the South along Barnet Road. For all these reasons, I am satisfied that the setting of the listed building is preserved and the new building with linking canopy does not have a harmful effect on the character and appearance of the area.
21. I conclude that the new single storey building with linking canopy does not have a harmful effect on the character and appearance of the area and preserves the setting of the Grade II listed building known as Potty's Diner. I therefore find no conflict with the development plan and in particular with the design and heritage aims set out in Policies CS14 and CS22 of the Hertsmere Core Strategy, 2013 (CS) or Policies SADM29 and SADM30 of the Hertsmere Local Plan, Site Allocations and Development Management Policies Plan, 2016 (DMPP). I also find no conflict with the heritage aims in the National Planning Policy Framework.

Acceptable location

22. The Land is situated within Potters Bar High Street District Centre where there is a broad mix of commercial uses, including retail and non-retail uses. However, the Council considers that a Shisha Lounge is not an appropriate use in this location as it would not maintain the retailing function and vitality of the immediate district centre and is a use which is more associated with late evening and the night time economy. It therefore has the potential to generate noise nuisance and disturbance to nearby residential occupiers.
23. The Land is not currently in use for retail purposes and there is no dispute that its lawful use is as a restaurant and formerly The Lion Public House. The Council's concern that the proposal would not maintain a retailing function

would therefore seem erroneous. Furthermore, the use as a Shisha Lounge would be an active use and I have not been provided with any substantive evidence that would lead me to believe that such a use would not contribute to the vitality of the area.

24. The Land is situated at the junction of two arterial routes and in an area which is predominantly commercial in character. In the vicinity of the site there are parades of shops, which also include restaurants and take-away premises, as well as a number of office premises and other town centre uses. I noted on my visit some of those commercial properties have residential accommodation on the floors above.
25. Considering the position of the site within the district centre, and taking into account the surrounding land use, then in accordance with Policy SADM47 of the DMPP, the use as a Shisha Lounge would be acceptable in this location provided it would not result in unacceptable impacts in terms of noise, traffic, parking, signage, lighting, general disturbance or problems of disorder and nuisance. The Land has a substantial car park available for the use of the building, and the site is situated close to public transport routes. The Council has not provided any substantive evidence that would demonstrate that the unauthorised use is currently resulting in noise/disturbance or nuisance to any nearby residents.
26. I am satisfied that the conditions suggested by the Council requiring details of a refuse disposal scheme and measures to control any potential emissions resulting from the use, are reasonable and necessary to protect the living conditions of any nearby residents. I also consider it necessary to impose a condition to control opening hours in order to prevent noise and disturbance to any nearby residents during the night-time. However, I have not been provided with any substantive evidence that would demonstrate that it is reasonable or necessary to restrict the hours of use to between 1200-2230 hours Mondays to Saturdays. The site occupies a location in a district centre and close to other night-time uses. In this commercial area and situated on a major thoroughfare background noise levels are likely to be much greater than those which would be found within a wholly residential neighbourhood. It therefore seems reasonable to me to restrict the hours of opening to reflect the licenced opening hours of the neighbouring restaurant, Potty's Diner which adjoins the Shisha Lounge and shares a car park with it.
27. For the reasons given above and subject to the specified conditions, the use as a Shisha Lounge is acceptable in principle in this location and there would be no harm to the living conditions of nearby residents. I find no conflict with Policy SADM47 of the DMPP which seeks to ensure, amongst other things, that night-time and evening uses do not result in unacceptable impacts in terms of noise and nuisance. I also find no conflict with the National Planning Policy Framework or the sustainable development principles set out in Policy SP1 of the CS.

Conclusions

28. For the reasons given above, I conclude that the appeal succeeds on ground (a). I shall grant planning permission for the development and use described in the notice, as corrected. The appeal on grounds (f) and (g) do not therefore fall to be considered.

29. The purpose of condition 2 below is to require the appellant to comply with a strict timetable for dealing with the exposure to external noise and disturbance which needs to be addressed in order to make the development acceptable. The condition is drafted in this form because, unlike an application for planning permission for development yet to commence, in the case of a retrospective grant of permission it is not possible to use a negatively worded condition precedent to secure the subsequent approval and implementation of the outstanding detailed matter. The condition therefore provides for the loss of the effective benefit of the grant of planning permission where the detailed matters in question are not submitted for approval during the time set by the condition, approved (either by the local planning authority ("LPA") or by the Secretary of State on appeal), and then implemented in accordance with an approved timetable. Should the requirements of the condition not be met in line with the strict timetable, then the use would have to cease.

Decision

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

- deleting the words "and listed building consent" in paragraph 3.
- deleting all of the wording in the second bullet point in paragraph 5.
- deleting the words "Steps 1 and 2" from the third bullet point in paragraph 5 and replacing them with "Step 1".

31. Subject to the corrections above, the appeal is allowed and the enforcement notice is quashed. Planning permission is granted on the application deemed to have been made under section 177(5) of the 1990 Act as amended, for the development already carried out, namely the erection of a single storey building with linking canopy to the eastern side and rear of a listed building and use as same as a Shisha Lounge at Land at Potty's Diner, 2 Barnet Road, Potters Bar, Hertfordshire EN6 2QS shown on the plan attached to the notice and subject to the following conditions:

1. The use hereby permitted shall only take place between the following hours:
1100 - 0130 Mondays – Thursdays
1100 Fridays - 0130 Saturday mornings
1000 Saturdays - 0130 Sunday mornings
1000 – Midnight on Sundays and Bank Holidays.
2. The use hereby permitted shall cease within three months days of the date of failure to meet any one of the requirements set out in i) to iv) below:
 - i) Within 3 months of the date of this decision a scheme for the storage and removal of waste and for any plant, machinery, chimneys, ducting, filters or extraction vents which are to be used in connection with the use shall have been submitted for the written approval of the local planning authority and the scheme shall include a timetable for their implementation.
 - ii) If within six months of the date of this decision the local planning authority refuse to approve the scheme or fail to give a decision within the prescribed period, an appeal shall have been made to, and accepted as validly made by, the Secretary of State.

- iii) If an appeal is made in pursuance of ii) above, that appeal shall have been finally determined and the submitted scheme shall have been approved by the Secretary of State.
- iv) The approved scheme shall have been carried out and completed in accordance with the approved timetable.

Upon implementation of the approved scheme specified in this condition, the scheme shall thereafter be maintained and remain in use.

In the event of a legal challenge to this decision, or to a decision made pursuant to the procedure set out in this condition, the operation of the time limits specified in this condition will be suspended until that legal challenge has been finally determined.

Elizabeth Pleasant

INSPECTOR