



Appeal Decision

Site visit made on 27 September 2021

by J Moss BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 24 December 2021

Appeal Ref: APP/G5180/C/21/3273642

Land at 129 Croydon Road, Beckenham BR3 3RA

- 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 Francesco Iannelli against an enforcement notice issued by the London Borough of Bromley.
 - The enforcement notice was issued on 22 March 2021.
 - The breach of planning control as alleged in the notice is: Without planning permission, the change of use from Newsagent (Use Class A1) to a coffee shop, deli and bar (Mixed use A1/A3/A4).
 - The requirements of the notice are:
 - a) cease the use of the premises as a coffee shop, deli and bar.
 - b) remove fixtures and fittings that enable the use of the premises as a coffee shop, deli and bar.
 - The period for compliance with the requirements is one month after the notice takes effect.
 - The appeal is proceeding on the grounds set out in section 174(2) (a), (b), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: The appeal is allowed and the enforcement notice is quashed following a correction in the terms set out below in the Formal Decision.

Application for costs

1. An application for costs was made by Mr Francesco Iannelli against the London Borough of Bromley. This application is the subject of a separate Decision.

Procedural Matters

2. The site visit had been arranged as an accompanied visit with a representative of both parties. However, having experienced difficulties getting to the site at the arranged time, when I arrived I was not met by either party. Nevertheless, the premises was open and an employee allowed me to view all parts of the ground floor, including the area to the rear and the rear access out onto the rear lane. I am satisfied that I saw all that I needed to in order to make my decision.
3. The breach of planning control alleged in the notice is of a change of use to a mixed use comprising 'a coffee shop, deli and bar'. The appellant has made his appeal under ground (b) and, therefore, makes the case that the breach of planning control has not occurred. However, part of the appellant's case is that, whilst there has been a change of use of the site, this change does not require the benefit of planning permission. The appellant's evidence in this regard falls squarely to be considered under ground (c). Whilst the Council has

not specifically referred to a ground (c) appeal, I am satisfied that they have responded to the appellant's claim that planning permission is not required. I have, therefore, considered the appellant's case under ground (c)¹ as well as ground (b) (considering these grounds together) and find that no injustice would be caused in doing so.

4. I acknowledge the representations of interested parties in this appeal and do not underestimate their concerns regarding the development. I have, however, allowed the appeal on legal grounds and have not been able to consider the planning merits of the development in this case.

The Notice

5. Part 1 of the notice states that there has been a breach of planning control falling within section 171A(1)(a) of The Town and Country Planning Act 1990 as amended (the 1990 Act), which is the carrying out of development without the required planning permission. Development is defined in section 55(1) of the 1990 Act as including 'the making of any material change in the use of any building or other land'. Whilst the notice alleges that a change of use has occurred, it does not allege that this is a **material** change. It therefore follows that the allegation in the notice would not constitute development for the purposes of section 55(1) of the 1990 Act.
6. Section 57 of the 1990 Act provides that planning permission is required for the carrying out of any development of land. Because the breach of planning control as alleged in the notice does not constitute the development of land, it follows that planning permission would not be required for it. The notice is defective in that respect.
7. Powers transferred to me to correct this defect² can only be exercised where the correction would not cause any injustice to either party. Having regard to the appellant's case to be considered under grounds (b) and (c), he has clearly understood that the allegation was intended to refer to a material change of use. As such, I am satisfied that a correction of the notice to include reference to a **material** change of use would not cause injustice in this case.
8. In addition to this, the allegation refers to a use falling within Class A1 and a mixed use of 'A1/A3/A4'. I assume that these references are to classes of use that at one time fell within Part A, Schedule 1 of The Town and Country Planning (Use Classes) Order 1987 as amended (the 1987 Order). However, part A was amended by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020 amended the 1987 Order, the effects of which came into force on 1 September 2020. The use classes referred to in the notice did not fall within the 1987 Order at the time the notice was issued. Furthermore, a mixed use could not have fallen under any one of the classes stated. Accordingly, reference in the notice to use classes A1, A3 and A4 of a previous version of the 1987 Order makes the notice defective.
9. With the above mentioned powers of correction in mind, the removal from the notice of reference to 'use class A1' and 'A1/A3/A4' would not alter the

¹ Section 174(2)(c) of The Town and Country Planning Act 1990 as amended (the 1990 Act) - (c) that those matters (if they occurred) do not constitute a breach of planning control.

² Under section 176(1)(a) and 176(1)(b) of the 1990 Act - to correct any defect, error or misdescription in the enforcement notice or to vary the terms of the enforcement notice.

allegation, nor would it alter the component parts of the alleged mixed use. Injustice would not, therefore, be caused to any party if the allegation were corrected to simply allege a material change of use from a newsagent to a mixed use as a coffee shop, deli and bar.

Grounds (b) and (c)

10. The appeal on ground (b) is that the matters alleged in the enforcement notice, which appears to the Council to constitute the breach of planning control, have not occurred. The ground (c) appeal is that the matters alleged in the notice do not constitute a breach of planning control. In both cases the test of the evidence is on the balance of probability.
11. The allegation, once corrected as intended, is of a mixed use as a coffee shop, deli and bar. Both parties have referred to the classes of use, mentioned above, that fell within Part A of Schedule 1 of the 1987 Order, prior to the 2020 amendment. It is suggested that Part A uses now fall within Class E of Part A, Article 3, of Schedule 2 of the 1987 Order, which comprises commercial, business and service uses.

12. Class E is:

Use, or part use, for all or any of the following purposes—

- (a) for the display or retail sale of goods, other than hot food, principally to visiting members of the public,*
- (b) for the sale of food and drink principally to visiting members of the public where consumption of that food and drink is mostly undertaken on the premises',*
- (c) for the provision of the following kinds of services principally to visiting members of the public—*
 - (i) financial services,*
 - (ii) professional services (other than health or medical services), or*
 - (iii) any other services which it is appropriate to provide in a commercial, business or service locality,*
- (d) for indoor sport, recreation or fitness, not involving motorised vehicles or firearms, principally to visiting members of the public,*
- (e) for the provision of medical or health services, principally to visiting members of the public, except the use of premises attached to the residence of the consultant or practitioner,*
- (f) for a creche, day nursery or day centre, not including a residential use, principally to visiting members of the public,*
- (g) for—*
 - (i) an office to carry out any operational or administrative functions,*
 - (ii) the research and development of products or processes, or*
 - (iii) any industrial process, being a use,*

which can be carried out in any residential area without detriment to the amenity of that area by reason of noise, vibration, smell, fumes, smoke, soot, ash, dust or grit.

13. The provisions of Article 3(1A) of the 1987 Order include, where a building or other land is used for a purpose of any class specified in Schedule 2, the use of that building or that other land for any other purpose of the same class is not to be taken to involve the development of the land. As a consequence, whilst the uses listed within Class E are wide-ranging, a change from one use to another does not involve the development of land. Furthermore, reference within Class E of a use, **or part use**, for all or any of the purposes listed introduces the ability of a mixture of any number of those uses listed to still fall within Class E.
14. It is common ground that the former use of the appeal site as a newsagent is a use that falls within Class E. There is no suggestion that the material change of use occurred after the introduction of Class E. In dispute is whether or not some elements of the mixed use alleged fall within Class E. Whilst the appellant does not necessarily find fault with the description of the use as including reference to a use as a bar, it is his case that the use of the premises at present falls entirely within Class E. The Council on the other hand has referred in particular to the bar element of the mixed use and the sale of alcohol from the premises. It suggests that this element of the mixed use does not fall within Class E.
15. In making its case the Council has referred to the planning application³, which sought permission for a use as described in the enforcement notice. It refers to the information submitted with that application which indicated that food would not be cooked on the premises. It also points to the layout plan which shows only a drinks and coffee shop counter, without any other kitchen facilities. The plans also show a vape counter to the front of the premises.
16. Whilst I have had regard to the application and the accompanying plans, my consideration of the ground (b) appeal is confined to what has occurred at the appeal site, and not what was proposed in a planning application. On site I noted that the layout of the premises is somewhat different to that indicated in the planning application. There is no vape counter and I could not see any means of purchasing vaping materials. Also, the section to the rear of the premises, beyond the w.c. facilities, is not a seating area, but is laid out and used as a kitchen area with storage, refrigeration and areas to prepare food. Within the seating area of the premises is a refrigerated display counter and cabinet used to display food. Behind this is an area used to prepare hot drinks. Adjacent to this is an area I would describe as a small bar; on the counter were beer taps and behind this were spirits and refrigerated drinks. The vast majority of the remaining area within the premises was used for seating.
17. I note the photograph of the menu provided by the Council, which includes an array of food that would require preparation and, in some instances, an element of cooking. At my visit I observed a number of customers sat at the tables eating food and drinking.
18. Whilst I acknowledge that the premises has a small bar area and that it has a licence to sell alcohol, I do not consider this to be a decisive factor in this case.

³ Application reference 20/00104/FULL1.

The sale of drinks, including alcoholic drinks, is an integral part of many establishments that sell food and drink for consumption on the premises. It is not unusual for such establishments to have a designated area for the preparation of drinks and to have beer available on tap.

19. The premises has a significant area for the storage, preparation and service of food and hot drinks. In addition to the kitchen area to the rear, the refrigerated display counter and cabinet is located centrally in the seating area of the premises. Such items are commonplace in coffee shops and delicatessens, and give the premises the character of such a use, rather than as a drinking establishment or bar.
20. Having regard to all of the above, as a matter of fact and degree I find that the use of the premises does not include a bar or drinking establishment. The evidence indicates that it is more likely than not that the premises is used for purposes that are described in Class E(a) and (b) of Part A, Article 3, Schedule 2 of the 1987 Order. In my judgement a mixed use as a coffee shop and delicatessen incorporates both of these uses.
21. In addition to this, it has not been suggested that there has been a material change in the nature of the use since the breach alleged in the notice first occurred, such that I could conclude that, despite my findings above, the breach of planning control alleged in the notice had occurred at some time prior to the issue of the notice.
22. For the reasons above, I conclude that on the balance of probability the material change of use alleged in the notice, once corrected as intended, has not occurred and the appeal under ground (b) must succeed.
23. In concluding as I have, I must consider whether or not I can correct the notice and move on to consider the ground (c) appeal. As I note above, the powers transferred to Inspectors in this regard can only be exercised where the correction or variation would not cause any injustice to either party. With this in mind, a correction to omit the reference to a use as a bar from the mixed use only follows from my conclusion that the mixed use of the premises does not include a use as a bar. All other parts of the parties' respective cases with regard to the remaining elements of the mixed use can still be considered. As such, a correction to the notice in the manner set out above would not cause injustice.
24. Moving on to the ground (c) appeal, as noted above, it is common ground that the previous use of the appeal site falls within Class E of Part A, Article 3, Schedule 2 of the 1987 Order and that the introduction of Class E was prior to the material change of use taking place in this case. I have also noted the provisions of Article 3(1A) of the 1987 Order; that the use of a building for any other purpose of the same class is not to be taken to involve the development of the land. Finally, reference within Class E of a use, or **part use**, for all or any of the purposes listed introduces the ability of a mixture of any number of those uses still falling within Class E.
25. Having regard to the above, the Council has referred to various suggested uses of the premises within its evidence, including for the purposes of takeaway sales, a shisha lounge and the sale of alcoholic drinks. Whilst I note the Council's suggestion that a use as a shisha lounge requires the benefit of planning permission, this is not a use that is alleged in the notice. Neither is a

use for the purposes of a takeaway, although in my judgement a premises used for a purpose falling within Class E(b) does not prevent an element of take away sales, provided the consumption of food and drink is **mostly** undertaken on the premises. I have acknowledged that the sale of alcohol takes place at the premises, but have concluded that this occurs as part of the use of the premises as a coffee shop and delicatessen, and not as part of a use as a bar or drinking establishment.

26. There is no suggestion that the use of the appeal site for the purposes of a coffee shop and delicatessen do not fall within Class E. I have no reason to disagree with this. As a change from one use within Class E to another use, or mixture of other uses within Class E is not taken to involve development, it is more likely than not that the alleged breach of planning control in this case, once corrected as intended, does not require the benefit of planning permission and does not, therefore, constitute a breach of planning control. For this reason the ground (c) appeal should succeed and the notice will be quashed. The appeal on grounds (a), (f) and (g) do not, therefore, fall to be considered.

Overall Conclusions

27. From the evidence before me, I conclude that the alleged breach of planning control set out in the enforcement notice is incorrect. Accordingly, the appeal succeeds on ground (b), however the notice is capable of correction. Notwithstanding this, I conclude that, on the balance of probabilities, the appeal on ground (c) should succeed in respect of those matters which, following the correction of the notice, are stated as constituting the breach of planning control.
28. The enforcement notice will be corrected and quashed. In these circumstances, the appeal on grounds (a), (f) and (g) do not need to be considered.

Formal Decision

29. It is directed that the enforcement notice is corrected by the deletion in part 3 of the words 'the change of use from Newsagent (Use Class A1) to a coffee shop, deli and bar (Mixed use A1/A3/A4)' and their substitution with the words 'the material change of use from a newsagent to a mixed use as a coffee shop and delicatessen'.
30. Subject to the correction, the appeal is allowed and the enforcement notice is quashed.

J Moss

INSPECTOR