



Appeal Decision

Site visit made on 24 February 2022

by L Perkins BSc (Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 20 May 2022

Appeal Ref: APP/Z5060/C/20/3258955
667-671 Green Lane, Dagenham RM8 1YA

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended.
- The appeal is made by Mr Mohammed Hafeez against an enforcement notice issued by the Council of the London Borough of Barking & Dagenham.
- The notice was issued on 8 August 2020.
- The breach of planning control as alleged in the notice is: Without planning permission, the unauthorised change of use of the property to a mixed use of a Snooker Hall (Use Class D2) and a Shisha Lounge at first-floor level (Use Class Sui Generis).
- The requirements of the notice are:
 - Cease operating the premises as a Snooker Hall (Use Class D2) and Shisha Lounge (Use Class Sui Generis).
 - Remove all alterations and fixtures related to the Snooker Hall (Use Class D2) and Shisha Lounge (Use Class Sui Generis).
 - Remove all consequent waste material from the premises.
- The period for compliance with the requirements is 3 months.
- The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (c) and (f) 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.

Summary Decision: The appeal is dismissed and the enforcement notice is upheld with a correction and variations in the terms set out below in the Formal Decision.

Preliminary Matters

1. The notice alleges a material change of use to a mixed use which is a *sui generis* use. A mixed use is a single use so it is not correct for the notice to describe the snooker hall component with 'Use Class D2' in parentheses. Therefore, I have deleted this reference from the breach of planning control alleged, using my powers of correction under section 176 of the 1990 Act. I am satisfied that by doing so no injustice is caused to the appellant or the Council.

Reasons

Ground (b)

2. An appeal on ground (b) is that the matters stated in the notice have not occurred as a matter of fact. In a ground (b) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.
3. The appellant accepts that there is a shisha smoking area at the property and that the premises are being used as a snooker hall. This reflects my observations at my site visit. However, in effect, the appellant argues that the mixed use alleged has not occurred since, in their view, the shisha lounge is not a primary use but is incidental to the use of the premises as a snooker hall.

4. The concept of a mixed use is one of two or more primary uses existing within the same planning unit or unit of occupation. One is not incidental to the other.
5. As I saw on my site visit, the appeal premises consist of the entire first floor of the building. This includes an outside area, at the rear, which is contained within what appears from the outside as a timber clad first floor rear extension. Its roof has been removed such that it is open to the sky. The premises are accessed from an entrance door at ground floor level on Greenside, ie on the flank elevation of the building. From here an internal staircase leads up to the first floor level.
6. At the time of my visit the venue contained 3 snooker tables, a gaming area, television screens, what appeared to be a DJ booth, storage areas, toilets, a bar, a small kitchen and a substantial amount of seating. Seating was mostly in the form of sofas, capable of accommodating approximately 70 people. The outside area had seating to accommodate approximately 15 people. Other than a single external door, there was no physical separation between the main internal area and the outside area. Taking the above into account, I consider the appeal premises consist of a single planning unit.
7. The outside area, that is said to be used for shisha smoking, and the inside area where snooker is played, appeared comparable in floor space. Bearing in mind that the onus is on the appellant, no evidence has been provided to substantiate the appellant's case that the shisha lounge use is 'very minimal' or that shisha smoking is 'incidental' or an 'ancillary' use.
8. In particular, there is nothing to indicate whether the substantial amount of indoor seating is there for customers who play snooker, or customers who smoke shisha, or both. Moreover, it has not been explained how shisha smoking is functionally related to playing snooker, for me to consider in this case that shisha smoking is a use incidental to the snooker playing use.
9. I have taken into account the previous appeal decision¹ that my attention has been drawn to. The Inspector in that decision found that the premises were a single planning unit with a mixed use for shisha smoking and use as a pool hall. I have not been provided with any information which leads me to a different conclusion to the previous Inspector in this regard and, for the purposes of this appeal, I have no reason to consider there is a significant difference between playing snooker and playing pool.
10. Taking all of the above into account, I am not satisfied that the matters stated in the notice have not occurred. As such, the appeal on ground (b) fails. Whether the change of use is a material change of use is a matter for the ground (c) appeal, below.

Ground (c)

11. An appeal on ground (c) is that the matters stated in the notice do not constitute a breach of planning control. This may be because what is alleged complies with the terms and conditions of an extant planning permission or because what is alleged is not 'development' as defined by section 55(1), for example because the change of use was not material. In a ground (c) appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.

¹ Ref APP/Z5060/C/18/3204100 dated 20 May 2019

12. There is no evidence planning permission exists for the mixed use alleged. So I must determine whether the mixed use alleged is materially different from the previous use. The notice does not recite the previous use, nor is this stated in the Council's evidence. But the appellant states that the primary use of the property remains that of a snooker hall, indicating that is the previous use. This has not been contested by the Council.
13. From all of the information available to me, it seems to me that the shisha smoking component of the use results in a significant difference in the character of the activities carried out on the premises, compared with what the appellant indicates has gone on previously.
14. In other words, the use of the premises for smoking shisha and playing snooker is significantly different from the use of the premises for just playing snooker. I say this because, from the information available to me, snooker is played indoors and (to comply with the Health Act 2006) shisha is smoked outdoors, with potential off-site effects such as the generation of smoke and noise made by customers outside. No information has been provided by the appellant to lead me to a different conclusion in this regard.
15. If the previous use was anything other than a snooker hall, then it has not been demonstrated that the use of the premises for smoking shisha and as a snooker hall is not materially different from the previous use.
16. I conclude the change of use alleged is materially different to what has gone on before, as a matter of fact and degree and therefore the ground (c) appeal fails.

Ground (a)

17. An appeal on ground (a) is that, in respect of any breach of planning control which may be constituted by the matters stated in the notice, planning permission ought to be granted.
18. In considering whether to grant permission, based on the reasons for issuing the notice, the main issues in the ground (a) appeal are:
 - the effect of the appeal development on the living conditions of residents on Greenside, with particular regard to noise and disturbance; and
 - whether adequate provision exists for car parking for the appeal development.

Living Conditions

19. In its reasons for issuing the notice, the Council identifies that the appeal development is neighbouring residential properties on Greenside and that it causes an increase in levels of noise and disturbance to the detriment of the residential amenity of neighbouring occupiers.
20. The appeal site is on the corner of Green Lane and Greenside. Green Lane is a busy high street location. The properties fronting Greenside are residential. As such, the appeal site is in a mixed acoustic environment where it is quieter to the rear than to the front.

21. The appellant has submitted a Noise Impact Assessment (NIA). The NIA is based on the opening hours of the appeal premises being 4 pm to 12 am, 7 nights a week. So I have assessed the appeal development on this basis.
22. Based on the information provided, my observations at the site visit and my own experience, it seems to me that the principal causes of noise and disturbance from the appeal development are likely to be from customers coming to and going from the premises, customers using the outside area and music coming from the premises.
23. I saw at the site visit that the closest residential properties are immediately to the rear of the appeal site (opposite its outside area) and on the opposite side of the road from its customer entrance. In these locations, particularly at the rear, background noise levels are likely to drop late in the evening due to being shielded from road traffic noise from Green Lane by the terraced buildings which front it.
24. The noise monitoring locations in the NIA are not close to the neighbouring residential properties identified by the Council. Nor, in my view, are the noise monitoring locations chosen representative of the nearest residential properties given that, according to the NIA, the location closest to the outside area is affected by noise from plant not associated with the appeal premises. So I am not satisfied the NIA facilitates an accurate comparison of noise from the appeal development with existing background noise levels, to demonstrate that the appeal development does not result in noise and disturbance.
25. The NIA does not address noise from the use of the outside area by customers late into the evening (when neighbouring residents should expect greater protection from noise) or the corresponding noise level at the nearest noise sensitive receptors. Whilst I saw the outside area is surrounded by high walls, sound from this area will be diffracted over the walls so it will still be heard even though the noise source may not be seen from outside the appeal site. Nothing has been provided to lead me to a different conclusion in this regard.
26. The NIA states that music 'will not' be played in the external smoking area. But this does not address noise from music played from within the venue, which the NIA indicates may be up to 90dB(A). This is loud. Music will likely break-out each time the external door to the outside area is opened. This could be frequent or continuous at busy times, as customers enter and leave the building from the outside area. No information has been provided to indicate otherwise.
27. I appreciate the premises may operate a no alcohol policy. But this does not alter my assessment of all of the noise and disturbance sources identified above. The appellant indicates they have not received any complaints. But this is not what is reflected by third party representations received and, in any event, a lack of complaints received by the appellant is not a good enough reason to allow the appeal development without a satisfactory NIA.
28. In respect of this main issue, I have carefully considered whether harm may be mitigated by planning conditions, to control the hours customers may be permitted on the premises and when amplified or other music may be played. But there is nothing in the NIA that provides an evidential basis for the acceptability of the use alleged at any particular time of day, particularly given the above concerns about the noise monitoring locations.

29. The appellant has suggested that customers be permitted on the premises between 1700 to 0200 Mondays to Sundays. The appellant has said that between 1700 to 1200² Mondays to Sundays is when amplified music should be able to be played in the premises, with 'background music' played till 0200 Mondays to Sundays.
30. The appellant has said that the above hours are due to the timings that customers usually tend to arrive and are in line with customer foot flow. But none of these timings are justified by the NIA provided, which only assesses the use on the basis of the opening hours referred to earlier.
31. Taking all of the above into account, I am not satisfied that the appeal development does not harm the living conditions of residents on Greenside, with particular regard to noise and disturbance.
32. So in respect of this main issue I conclude that the appeal development does not comply with Policy BP8 of the Borough Wide Development Policies Development Plan Policies Document, adopted March 2011.

Car Parking

33. The Council considers that the use exacerbates a shortfall of car parking as it does not provide adequate parking for the number of customers the development caters for. But from the information provided, it has not been identified what harm occurs as a result, or the severity of any such harm.
34. Consequently, based on the limited case put to me, I have not found conflict with Policy BR9 of the aforementioned Borough Wide Development Policies Development Plan Document.

Conclusion on the Ground (a) appeal

35. Whilst I have not found car parking for the appeal development to be inadequate, I have found harm arising from the effect of the appeal development on living conditions. I find conflict with the development plan overall therefore and conclude that the appeal on ground (a) fails.

Ground (f)

36. An appeal on ground (f) is that the steps required by the notice to be taken, or the activities required by the notice to cease, exceed what is necessary to remedy any breach of planning control which may be constituted by those matters or, as the case may be, to remedy any injury to amenity which has been caused by any such breach.
37. Under section 173(4) of the 1990 Act, when serving an enforcement notice the Council may seek to (a) remedy the breach by making any development comply with the terms (including conditions and limitations) of any planning permission which has been granted in respect of the land, by discontinuing any use of the land or by restoring the land to its condition before the breach took place; or (b) remedy any injury to amenity which has been caused by the breach.
38. Based on the requirements of the notice, it is clear that the purpose of the notice is to remedy the breach, ie purpose (a), above.

² I assume this to mean 0000, ie midnight.

39. Amongst other things, the notice requires the snooker hall component of the use to cease and requires all alterations and fixtures related to the snooker hall use to be removed.
40. As the Council has not stated what the previous use was and the Council has not contested the appellant's assertion that the previous use was a snooker hall, I cannot be certain that the snooker hall use was not the previous (and lawful) use.
41. The requirements of an enforcement notice cannot take away existing lawful use rights, including the right of reversion under section 57(4) of the 1990 Act. So the notice should be varied so as not to prevent any lawful activity.
42. To this end, the first two requirements of the notice, respectively, should require the mixed use to cease and only require the removal of the alterations and fixtures related to the shisha lounge. The issue of whether the snooker hall use is in fact the lawful use may be addressed by a certificate of lawfulness application or further enforcement action, if necessary.
43. The ground (f) appeal succeeds to this extent, albeit not for the reasons referred to by the appellant.

Other Matters

44. I appreciate that the Council has previously issued an enforcement notice, dated 4 May 2018, and that notice was quashed on appeal³. But this has no bearing on the notice which is before me now or the grounds of appeal in this case.
45. The appellant states that the Council has made no attempt to communicate or consider a retrospective application. But the way in which the Council has handled the case is not a matter for me to consider in the context of an appeal under section 174. Moreover, it was open to the appellant to submit an application for planning permission for the appeal development, prior to the issue of the enforcement notice.

Conclusion

46. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice with corrections and variations and refuse to grant planning permission on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

Formal Decision

47. It is directed that the enforcement notice is corrected by:
- the deletion of "(Use Class D2)" in the breach of planning control alleged in paragraph 3 of the notice; and
 - the deletion of references to "(Use Class D2)" and "(Use Class Sui Generis)" in the requirements in paragraph 5 of the notice.

³ Ref APP/Z5060/C/18/3204100 dated 20 May 2019

48. It is directed that the enforcement notice is varied by:

- the deletion of the first requirement in paragraph 5 of the notice and its substitution with: "Cease the mixed use."
- the deletion of "Snooker Hall (Use Class D2) and" in the second requirement in paragraph 5 of the notice

49. Subject to these corrections and variations, the appeal is dismissed, the enforcement notice is upheld and planning permission is refused on the application deemed to have been made under section 177(5) of the 1990 Act as amended.

L Perkins

INSPECTOR