



Appeal Decisions

Site visit made on 11 May 2022

by **E Griffin LLB Hons**

an Inspector appointed by the Secretary of State

Decision date: 15th July 2022

Appeal A Ref: APP/F2415/C/22/3293787

The building known as 1 Angel Court, High Street, Market Harborough, Leicestershire, LE16 7NL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by The Core Dance Company against an enforcement notice issued by Harborough District Council.
- The enforcement notice was issued on 17 January 2022.
- The breach of planning control alleged is failure to comply with conditions.
On the 1 August 2005, planning permission subject to planning conditions, was granted by the Council under reference number 05/00939/FUL for the change of use to a ladies fitness centre at 1 Angel Court, High Street, Market Harborough.
Conditions 1 to 3 of 05/00939/FUL required:
Condition 1
The use hereby permitted shall operate only within the hours specified on the application form: 9.00am to 7.30pm Mondays to Fridays, 9.00am to 1.00pm Saturdays, and at no time on Sundays.
Condition 2
The windows on the east elevation shall remain closed at all times when the use is in operation
Condition 3
The premises shall be used as a fitness centre and for no other purpose (including any other purpose in Class D2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987)
REASON (applicable to all three conditions): To ensure that as far as possible the proposed use does not become a source of annoyance to the nearby residents and to ensure compliance with Policy IN/1 of the Harborough District Local Plan.
It appears to the Council that Conditions 1, 2 and 3 of 05/00939/FUL are not being complied with. The Land, is being used as a dance studio which is defined as a Sui generis use, as amended by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. Condition 3 does not allow a change to any other use within the previous use class D2, the dance studio now being defined a Sui generis use, following the amended Use Classes Order.
Additionally, the dance studio operates outside of the permitted hours set out in condition 1, and the windows on the east elevation, are not permanently closed at all times when the use is in operation, as required by condition 2. A copy of decision notice 05/00939/FUL, is attached as Appendix 1 of this Notice.
- The requirement of the notice is to: Cease the use of the Land for any other use other than that approved under 05/00939/FUL (condition 1) and in full compliance with all other conditions attached to that permission.
- The period for compliance with the notice is 4 months.
- The appeal is proceeding on the grounds set out in section 174(2)(b) and (c) of the Town and Country Planning Act 1990 as amended (the Act)

Summary of Decision: Subject to variations, the appeal is dismissed and the enforcement is upheld

Appeal B: Ref: APP/F2415/C/22/3291554

**The building known as 1 Angel Court, High Street, Market Harborough
Leicestershire, LE16 7NL**

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Peter Cooke against an enforcement notice issued by Harborough District Council.
- The enforcement notice was issued on 17 January 2022.
- The breach of planning control alleged is failure to comply with conditions.
On the 1 August 2005, planning permission subject to planning conditions, was granted by the Council under reference number 05/00939/FUL for the change of use to a ladies fitness centre at 1 Angel Court, High Street, Market Harborough.
Conditions 1 to 3 of 05/00939/FUL required:
Condition 1
The use hereby permitted shall operate only within the hours specified on the application form: 9.00am to 7.30pm Mondays to Fridays, 9.00am to 1.00pm Saturdays, and at no time on Sundays.
Condition 2
The windows on the east elevation shall remain closed at all times when the use is in operation
Condition 3
The premises shall be used as a fitness centre and for no other purpose (including any other purpose in Class D2 of the Schedule to the Town and Country Planning (Use Classes) Order 1987)
REASON (applicable to all three conditions): To ensure that as far as possible the proposed use does not become a source of annoyance to the nearby residents and to ensure compliance with Policy IN/1 of the Harborough District Local Plan.
It appears to the Council that Conditions 1, 2 and 3 of 05/00939/FUL are not being complied with. The Land, is being used as a dance studio which is defined as a Sui generis use, as amended by the Town and Country Planning (Use Classes) (Amendment) (England) Regulations 2020. Condition 3 does not allow a change to any other use within the previous use class D2, the dance studio now being defined a Sui generis use, following the amended Use Classes Order.
Additionally, the dance studio operates outside of the permitted hours set out in condition 1, and the windows on the east elevation, are not permanently closed at all times when the use is in operation, as required by condition 2. A copy of decision notice 05/00939/FUL, is attached as Appendix 1 of this Notice.
- The requirement of the notice is to: Cease the use of the Land for any other use other than that approved under 05/00939/FUL (condition 1) and in full compliance with all other conditions attached to that permission.
- The period for compliance with the notice is 4 months.
The appeal is proceeding on the grounds set out in section 174(2)(c) and (f) of the Town and Country Planning Act 1990 as amended (the Act)

Summary of Decision: the appeal is dismissed and the enforcement is upheld as varied under Appeal A

Preliminary Matters Appeals A and B

1. There are two separate appeals against the same notice, with Appeal A being made by the occupier of the appeal building and Appeal B by the owner. The appeals have a combination of grounds of appeal and both have ground (c) appeals. The appeals have been considered separately based upon the evidence provided with regard to the individual appeal. However, as the appeals relates to the same notice and any variations to the notice will affect both appeals they are being dealt with in the same Decision Letter.

Appeal A

Preliminary Matters

2. The appeal is limited to grounds (b) and(c) only. There is no appeal under ground (a) which would have included an assessment of planning considerations and therefore matters such as the benefits of fitness or where fitness and dance facilities should be located are not matters within the remit of this appeal.
3. The final comments included a statement by the Company, a legal opinion as well as comments made upon the Council's evidence. The Council was given an opportunity to comment upon the documents but has chosen not to do so. I have taken the content of those documents into account in reaching my decision where the content relates directly to the grounds of appeal before me.

The Notice

4. The notice does not follow the usual wording where a failure to comply with conditions is alleged although the notice does contain all of the necessary information. However, the requirement requires clarity and should address the conditions individually rather than refer to full compliance. I am satisfied that no injustice is caused to any party by referring to each condition in terms of compliance and I will vary the notice to that extent. I have repeated the reference to D2 in condition 3 despite the changes to the Use classes as retaining the original wording maintains the status quo and does not cause injustice to either party.

Planning History

5. The notice relates specifically to conditions 1, 2 and 3 of the planning permission (the Planning Permission) issued on the 1 August 2005 for the "change of use to a ladies only fitness centre, 1 Angel Court, High Street, Market Harborough". There are no other conditions.
6. The Planning Permission was granted to Curves Ladies Fitness Centre which was a ladies gym. Curves left the appeal building in December 2018 and the Company took over the appeal building in March 2021. Whilst applications for planning permission for a change of use and to vary the hours of operation were made, those applications were subsequently withdrawn. The conditions, the subject of this appeal, are therefore still in force without amendment.

The appeal premises

7. The appeal building is located in Dairy Yard which is made up of a collection of buildings located to the rear of shops and businesses on the High Street within the town centre. Access to the Dairy Yard is through a passageway which runs from the High Street to the Angel Street public car park. Parties refer to the passageway as "private" and there are signs to that effect but how any rights to maintain the passageway as private are enforced is not part of this appeal.
8. The appeal building is two storey with a dance studios at each level with modest facilities including toilets. There is no reception area. Surrounding buildings include offices, a hairdressers, the Dairy Yard Meditation Centre and dwellings.

Appeal under ground (b)

9. An appeal under ground (b) is that the matters alleged in the notice have not occurred as a matter of fact. For an appeal to succeed under this ground, the onus is upon the appellant to show that the matters alleged in the notice have not occurred. The allegation relates to the conditions which deal with the hours of operation, the restriction on the opening of windows on the east elevation and use of the appeal site. During the course of the appeal, the appellant clarified that the ground (b) appeal related only to condition 2 relating to the windows.

Condition 2 - The windows on the east elevation shall remain closed at all times when the use is in operation

10. The appeal building has a number of windows but the condition relates only to the two windows at first floor level on the eastern elevation. However, the appellant maintains that the east elevation windows have never been open as they are painted over and are padlocked and the appellant does not have the keys.
11. Although general comments by third parties are made about windows facing the Dairy Yard being open, the east elevation windows do not face the Dairy Yard. The Council in its statement accepts that the windows on the east elevation are now either locked internally or painted closed and that the appellants are no longer breaching this condition. The appellant has now installed air conditioning to remove the need to open any windows but that is an operational matter for the appellant. However, in the absence of any specific evidence about the two eastern elevation windows, I do find that a breach of condition 2 has not occurred as a matter of fact. The appeal under ground (b) with regard to condition 2 therefore succeeds. I will amend the notice accordingly.

Appeal under ground (c)

12. An appeal under this ground is that the matter alleged in the notice does not constitute a breach of planning control. The onus of proof is on the appellant. The Council alleges that condition 3 is not being complied with as the use which operates from the appeal building is being used as a dance studio and not as a fitness centre. The appellant's argument is that the use of the appeal building as a dance and performing arts studio still falls within condition 3.
13. Condition 3 states *"The premises shall be used as a fitness centre and for no other purpose (including any other purpose in Class D2 of the Schedule to the Town and Country Planning (Use Classes Order) 1987."* As stated in the notice, the reason given for imposing all three conditions is *"to ensure that as far as possible the proposed use does not become a source of annoyance to the nearby residents and to ensure compliance with Policy IN/1 of the Harborough District Plan"*
14. The wording is clear and unambiguous and the purpose is to restrict the use for amenity reasons and the use can only be as a fitness centre. The wording of the condition does prevent changing to other uses within the same use class. It is the case that the Use Classes were amended under the Town and Country Planning (Use Classes) (Amendment)(England) Regulations 2020 in

September 2020 and Class D2 has been superseded. However, the changes to the Use Classes do not alter the need to fall within "fitness centre" use as per the wording of the condition.

15. This is confirmed in the legal opinion provided by the appellant which states at paragraph 2.11 "the issue for the Inspector is whether or not the use of the premises as a dance studio can be regarded as a fitness centre". The opinion further states that "whether the nature of the use falls within the condition. Consideration needs to be given not just to the nature of the activities but also the impact of those activities within the premises and the impact of the activities beyond the premises on the external environment". The reason for the condition seeks to protect resident amenities in the vicinity of the appeal building.
16. The nature of the use at the time of the grant of the planning permission was of a traditional style gym where members of the public specifically women visited at various times to use gym equipment. I share the parties' view that the conditions do not restrict use to women only. Members of the gym were likely to attend either individually or in small groups to exercise and use gym equipment and then leave. The way in which fitness has evolved since the grant of planning permission in 1995 has changed but the purpose of a fitness centre is still to get people fit. The current business is described as a dance and performing arts studio and the purpose is to teach dance and performance.
17. The signage on the front and side of the appeal building is "Core Dance Company Keeping Performance Fresh." The words "And Fitness" appear to have been added in different font underneath the existing wording to the sign at the front but not the side. The emphasis is on music, dance and performance within the two studio areas and classes take place during the day and evening and on Saturday mornings. The hours of operation are 9.00 a.m. to 7.30pm in the week and from 9am to 1pm on Saturdays when childrens parties have taken place. The nature of the activities taking place has changed and a number of classes are designed for children including pre – school children.
18. There are a number of objections by third parties to the use of the appeal building. The focus of the objections is noise both from within the appeal building with windows being open and also with groups congregating and waiting outside in Dairy Yard. Within the building, the nature of the use with music, singing, dancing and an instructor does generate noise. Although the appellant indicates that microphones are no longer used, a nearby resident refers to windows wide open with music and teachers instructions blasting out on many occasions. Users of the Meditation Centre refer to noise from the building and children causing noise and disturbance whilst waiting to go into group classes.
19. The timetable provided by the Council indicated the nature of the classes being held with a number of classes such as Junior Performance Team being for children aged 4-8 who would be accompanied. Hours of operation included an 8.45a.m start on Saturdays and evening classes after 7.30 p.m. with the latest evening class finishing at 9.00p.m. The appellant's position with regard to the hours condition is that the condition has been breached in the past but is now being complied with. However, the timetable and extended hours is an indication of how the Company operated prior to the issue of the notice.

20. Outside the building, the arrival and departure of groups of parents and children at similar times for classes and the number of classes for children has also changed the nature of the use. The absence of an internal reception or seating area means that children accompanied by parents have to wait outside the appeal building and only leave once children have been checked in at the door at the appointed time. Parents then return later to wait outside to collect children. I was able to observe this process on the morning of the site visit before the accompanied site visit took place.
21. There is no designated outside space for the appeal building and there are dwellings in the Dairy Yard as well as a Meditation Centre directly across from the appeal building. Any social interaction takes place in close proximity of premises of other occupiers including residents. The appellant is critical of reliance by the Council upon third party evidence. However, the evidence upon which the Council relies is first hand evidence of people who use nearby facilities such as the Dairy Yard Meditation Centre or live nearby and are the people most affected by the use of the appeal building. Whilst there is a sign on the front door marked as "Polite Notice" asking for members to be mindful of local residents, in practical terms that is difficult to enforce.
22. I note that there are some letters of support for the facility but those supporters have not commented upon the conditions themselves and do not appear to live near the appeal building. The appellant has provided emails from the nearby businesses which refer to improvements in her final comments. However, their experiences are not necessarily the same as for full time residents and the later comments pre- date the third party comments received under the appeal timetable.
23. Clearly there are fitness centres that operates in different ways and a number of facilities now provide a mix of exercise classes in addition to gym equipment. However as a dance and performing arts facility with two studios, the purpose is not primarily fitness but learning dance and performing arts through structured group lessons. In terms of defining the use, the Council has used the term dance studio in the notice. However, the characteristics of the use are the matters for consideration in relation to the scope of "fitness centre" rather than labelling a use. Children waiting in groups with parents and being checked in and out has similarities with a school use or a nursery for pre-school children. There is also no scope for individuals to attend and exercise alone, all activities are instructor led with music at set times for groups restricted by age in the case of children. The school element is also present with the number of classes for children. These are not characteristics that would be associated with a fitness centre but with a teaching or school facility.
24. The statement of the appellant submitted as part of final comments essentially sets out her history from the setting up of her company in 2019 through to improvements she has made up to the date of her statement in May 2022 particularly noise measures inside the appeal building. However, there is no indication in her statement as to which of those improvements were in place prior to the issue of the notice in January 2022. The extent and impact of those improvements and how the Company has operated after the issue of the notice are matters for the appellant to discuss with the Council.
25. To succeed on a ground (c) appeal, the appellant has to show that the matters alleged in the notice did not constitute a breach of planning control. I do find as

a matter of fact and degree, that the character and nature of the current use of the site is materially and significantly different from the use permitted by the condition. The use taking place therefore contravenes condition 3 of the 2005 planning permission. Express planning permission is therefore required for that use and the appeal under ground (c) fails.

Other matters

26. The appellant is critical of the Council for a number of reasons including advice given at an early stage, its handling of the planning application that was withdrawn and also the decision to issue an enforcement notice. However, those are matters between the Council and the appellant and it is for the Council to assess whether or not it is expedient to issue an enforcement notice. Whilst the appellant has referred to the Human Rights Act, its provisions do not apply to the limited grounds before me.

Appeal B

Appeal under ground (c)

27. As with Appeal A, an appeal under this ground is that the matter alleged in the notice does not constitute a breach of planning control. The appellant is referring to the use condition under this ground. The onus of proof is therefore on the appellant to show that there has not been a breach of condition 3 relating to use. The ground (c) appeal is contained in the appeal form and states "that the use falls within D2 and the Council has misdirected themselves by confusing a dance school with a Dance Hall (sui generis) which are distinct and separate uses." However, no reference is made by the appellant to the wording of the condition. The issue is not whether the use falls within D2 or what use class other uses fall into when the condition specifically restricts the use to fitness centre only. The appellant has not discharged the onus of proof to show that there has not been a breach of planning control relating to condition 3. The appeal under ground (c) therefore fails.

Appeal under ground (f)

28. Section 174(2)(f) of the Act states that an appeal may be made on the ground that the steps required by the notice to be taken, 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. The purpose of the notice is to remedy the breach by complying with the conditions. The ground (f) appeal refers only to the breach of condition 3 which relates to the use.
29. The owner appellant simply states in his appeal form that the "difference between the actual use and the permitted use are so insignificant so as to be de minimis." However, I have found that the use condition has been breached and the requirement of the notice is to comply with the condition. The appellant has not suggested any lesser steps that would achieve compliance. How compliance with the condition is achieved in the future is a matter for the parties. In the circumstances, to require compliance with the relevant condition is not excessive. The appeal under ground (f) therefore fails.

Formal Decisions

Appeal A

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

- i) deleting all references to condition 2 in the allegation.
- ii) deleting the requirement in full and replacing it with
 - a) " Comply with condition 1 of planning permission reference number 05/00939/FUL by only operating from the premises within the specified hours which are 9.00a.m. to 7.30p.m Mondays to Fridays 9.00a.m to 1.00p.m Saturdays and at no time on Sundays.
 - b) Comply with condition 3 of planning permission reference number 05/00939/FUL by ceasing use of the premises other than as a fitness centre and for no other purpose (including any other purpose in Class D2 of the Schedule to the Town and Country Planning (Use Classes Order)."

31. Subject to the variations, the appeal is dismissed and the enforcement notice is upheld.

Appeal B

32. The appeal is dismissed and the enforcement notice as varied pursuant to the Formal Decision in Appeal A above is upheld.

E Griffin

INSPECTOR