



Appeal Decision

Site visit made on 4 July 2022

by F Cullen BA(Hons) MSc DipTP MRTPI IHBC

an Inspector appointed by the Secretary of State

Decision date: 27 September 2022

Appeal Ref: APP/N4720/C/22/3296640

Land at Phoenix House, Roman Terrace, Roundhay, Leeds LS8 2DU

- 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 1990 Act as amended).
 - The appeal is made by Ms Rachel Woolford against an enforcement notice issued by Leeds City Council.
 - The notice, numbered 20/00774/NCP3, was issued on 11 March 2022.
 - The breach of planning control as alleged in the notice is, without planning permission, the change of use of the premises to a gymnasium / fitness studio and associated works resulting in alterations to the external appearance of the premises, including erection of A/C extractor units, raised outdoor seating, external timber cladding and timber fence adjacent to Roman Terrace.
 - The requirements of the notice are to: Step 1. Cease the use of the premises for the purposes of gymnasium and/or fitness studio; and Step 2. Carry out such works in order to bring the premises to the state in which it was prior to the unauthorised use taking place, including the removal of the A/C extractor units, raised outdoor seating, external timber cladding and timber fence adjacent Roman Terrace.
 - The period for compliance with the requirements: Two months.
 - The appeal is proceeding on the grounds set out in section 174(2) (b), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Summary Decision: The appeal is dismissed and the enforcement notice is upheld.

Procedural Matters

1. The Council issued the enforcement notice (the notice) because it appeared to them that there has been a breach of planning control within paragraph (a) of section 171A(1) of the 1990 Act as amended, namely, carrying out development without the required planning permission.
2. However, planning permission was granted for the change of use from offices (class use B1) to assembly and leisure (class use D2); wall and decking to front, at Phoenix House, Roman Terrace, Roundhay, Leeds LS8 2DU on 10 October 2019¹ (the planning permission). Additionally, the Council's statement focuses on the appellant's failure to comply with condition 4² of that planning permission, as well as the erection of A/C extractor units, raised outdoor seating, external timber cladding and a timber fence adjacent to Roman Terrace which were not part of the planning permission.

¹ Application Ref: 19/04303/FU.

² Condition 4. The use hereby approved shall not commence until a scheme to control noise emitted from the premises including details of sound insulation has been submitted to and approved in writing by the Local Planning Authority, and the agreed scheme installed/implemented as approved. The approved scheme shall be retained thereafter. Reasons: In the interests of residential amenity.

3. On this basis, I asked the parties for their comments on whether the alleged breach of planning control should be more properly be described as falling within paragraph (b) of section 171A(1) of the 1990 Act as amended, specifically, failing to comply with any condition or limitation subject to which planning permission has been granted.
4. The appellant confirmed their view that the breach of planning control should be more properly be described as falling within paragraph (b). Conversely, the Council commented that, as condition 4 is a pre-commencement condition which goes to the heart of the planning permission, the development is totally unauthorised and therefore would be more properly be described as falling within paragraph (a).
5. It is clear that condition 4 expressly prohibits the commencement of the approved use taking place before its particular requirements have been met. Moreover, given the potential implications to the living conditions of adjacent residents if the specific requirements of the condition are not met, it is of such significance that it could be reasonably concluded to go to the heart of the planning permission.
6. In giving careful consideration to the parties' views and being mindful of case law on this matter³, I am persuaded that the alleged breach of planning control is properly described as falling within paragraph (a) and I have determined the appeal on this basis.
7. The appeal has been submitted on grounds (b), (f) and (g) of the 1990 Act as amended. Nonetheless, given the above and mindful of the matters stated in the notice, in considering the appeal on ground (b) there is a degree of overlap with ground (c), namely, that the matters stated in the notice do not constitute a breach of planning control. Consequently, I have determined the appeal as proceeding on grounds (b) and (c) together. I am satisfied that no injustice would be caused by me taking this approach.
8. Representations have been received from an interested party alleging harmful effects to their living conditions arising from the use of the premises as a gymnasium/fitness studio and from development which they contend has been implemented without planning permission.
9. Nevertheless, in the absence of an appeal on ground (a), namely, that planning permission ought to be granted for the matters stated in the notice, I am not able to consider the planning merits of the development. I will, however, take these representations into account in my consideration of the appeal on ground (g) below.
10. The appellant has commented on the origins and basis of the enforcement proceedings. They have also highlighted their efforts to discharge the conditions of the planning permission; seek retrospective approval for the associated works which were not part of the planning permission; and to address the issues raised by the Council and interested parties to ensure the longevity of the business within the local community. Nevertheless, these matters, of themselves, are not within the remit of my considerations in the context of this appeal.

³ *F G Whitley and Sons v Secretary of State for Wales and Clwyd CC* [1991] JPL 856; *R (oao Hart Aggregates Ltd) v Hartlepool BC* 2005 EWHC 840 (Admin); and *Greyfort Properties Ltd v Sec. of State for Communities & Local Govt.* [2011] EWCA Civ 908.

Appeals on grounds (b) and (c)

11. The appeal on ground (b) is that those matters stated in the notice have not occurred. The appeal on ground (c) is that the matters stated in the notice do not constitute a breach of planning control. On both of these grounds of appeal the onus is on the appellant to make out their case to the standard of the balance of probabilities.
12. In considering the appeals on these grounds there is a need to determine whether the change of use of the premises from offices to a gymnasium/fitness studio had occurred by the date of the issue of the notice⁴, and whether it constituted a material change of use that required planning permission. In addition, whether the associated works of A/C extractor units, raised outdoor seating, external timber cladding and a timber fence adjacent to Roman Terrace were erected by the date of the issue of the notice, and whether they constituted development that required planning permission.
13. The Council contend that the site has operated as a gymnasium/fitness studio since March 2020. This has not been disputed by the appellant and at the time of my site visit, the building's use as a gymnasium/fitness studio appeared to be ongoing. On this basis, I am satisfied that, on the balance of probabilities, the change of use of the premises from offices to a gymnasium/fitness studio had occurred by the date of the issue of the notice.
14. Section 55 of the 1990 Act as amended defines 'development' for the purposes of the Act as 'the carrying out of building, engineering, mining or other operations in, on, over or under land, or the making of any material change in the use of any buildings or other land.' The submitted evidence confirms that the former use of the premises was offices. Having regard to the Use Class Order⁵ at the time of the stated change of use, March 2020, the change of use was to a different use class, B1 to D2. Moreover, the difference in the character of the two activities of an office and a gymnasium/fitness studio is material as a matter of fact and degree. In these respects I am satisfied that, on the balance of probabilities, the change of use from offices to a gymnasium/fitness studio constituted a material change of use that required planning permission.
15. During my site visit I viewed the associated works of A/C extractor units, raised outdoor seating, external timber cladding and a timber fence adjacent to Roman Terrace which were not part of the planning permission. Neither party has confirmed the date that they were erected. However, I have no reason to question the Council's assertion that they were in place when the notice was issued. On this basis, I am satisfied that, on the balance of probabilities, the A/C extractor units, raised outdoor seating, external timber cladding and timber fence adjacent to Roman Terrace were erected by the date of the issue of the notice.
16. The definition of development for the purposes of the 1990 Act as amended is cited above. Section 55(2) sets out operations or uses of land which shall not be taken for the purposes of the Act to involve development of the land. The appellant has not claimed that the associated works fall under any of the operations included within section 55(2).

⁴ 11 March 2022.

⁵ Town and Country Planning (Use Classes) Order 1987.

17. The A/C extractor units, raised outdoor seating, external timber cladding and timber fence adjacent to Roman Terrace change the external appearance of the building, and are clearly visible and readily perceived from a number of public vantage points along the adjacent streets. As such, I am satisfied that, as a matter of fact and degree, they materially affect the external appearance of the building as a whole and constitute development as defined under section 55 of the 1990 Act as amended. Consequently, under section 57 of the 1990 Act as amended, they require planning permission.
18. I therefore conclude that, on the balance of probabilities, the matters stated in the notice have occurred and that they do constitute a breach of planning control. Accordingly, the appeals on grounds (b) and (c) fail.

Appeal on ground (f)

19. The 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.
20. When an appeal is made on ground (f), it is essential to understand the purpose of the notice. Section 173(4) of the 1990 Act as amended sets out the purposes which an enforcement notice may seek to achieve, either wholly or in part. These purposes are, in summary, (a) the remedying of the breach of planning control by discontinuing any use of the land or by restoring the land to its condition before the breach took place, or (b) remedying any injury to amenity which has been caused by the breach.
21. In this case, the requirements of the notice are to: Step 1. Cease the use of the premises for the purposes of gymnasium and/or fitness studio; and Step 2. Carry out such works in order to bring the premises to the state in which it was prior to the unauthorised use taking place, including the removal of the A/C extractor units, raised outdoor seating, external timber cladding and timber fence adjacent Roman Terrace.
22. The purpose of the notice must therefore be to remedy the breach of planning control that has occurred by discontinuing any use of the land and restoring the land to its condition before the breach took place. In these respects I am mindful that it is settled case law that an enforcement notice that alleges a material change of use can require the removal of operational development that is ancillary to the use⁶.
23. The appellant highlights the efforts undertaken to reduce any sound transfer from within the building. Whilst this is acknowledged, anything less than the requirements of the notice would not fully remedy the breach of planning control.
24. I note the applications which are stated to be currently pending to discharge conditions attached to the planning permission, including condition 4⁷, and for

⁶ *Murfitt v SSE & East Cambridgeshire DC* [1980] JPL 598

⁷ Application Ref: 22/00263/COND consent, agreement or approval required by Conditions 4 and 9 of Planning Application 19/04303/FU, pending consideration, received 12 January 2022, validated 14 March 2022.

the grant of planning permission for the associated works⁸. The Council submit that, if the pending applications were granted, then they would consider it expedient and in the public interest to amend Step 2 of the requirements of the notice to allow for the implementation of an approved scheme within the same compliance period⁹. However, there is nothing in the submitted evidence which confirms whether these applications would be or have been considered favourably by the Council.

25. Taking the above into account, I conclude that the steps required by the notice to be taken do not exceed what is necessary to remedy the breach of planning control, but are proportionate given the purpose of the notice. Accordingly, the appeal on ground (f) fails.

Appeal on ground (g)

26. The appeal on ground (g) is that any period specified in the notice in accordance with section 173(9) of the 1990 Act as amended falls short of what should reasonably be allowed. In this instance, the period for compliance of the notice's requirements is stated to be two months.
27. The appellant was given the opportunity to confirm what they consider would be a reasonable compliance period. However, no response was received. I am mindful of the representations received in respect of the use of the premises as a gymnasium/fitness studio and note the appellant's willingness to carry out the approved scheme immediately if the pending application to discharge condition 4 is granted. On this basis, I am satisfied that a compliance period of two months is reasonable.
28. I conclude that the compliance period specified in the notice does not fall short of what should reasonably be allowed. Accordingly, the appeal on ground (g) fails.

Conclusion

29. For the reasons given above, I conclude that the appeal should not succeed. I shall uphold the enforcement notice.

Formal Decision

30. The appeal is dismissed and the enforcement notice is upheld.

F Cullen

INSPECTOR

⁸ Application Ref: 22/00223/FU retrospective application for installation of additional air conditioning units with sound reducing framework; external timber cladding and fence, pending consideration, received 11 January 2022, validated 29 March 2022.

⁹ Page 6, Ground f) of the Appeal. Leeds City Council Statement.