



Appeal Decisions

Site visit made on 21 February 2023

by D Fleming BA (Hons) MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 March 2023

Appeal A Ref: APP/E5900/C/22/3300134

80 St Stephens Road, London, London, London, E3 5JL

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Ms Phuong Kim Huynh against an enforcement notice issued by London Borough of Tower Hamlets.
 - The notice was issued on 20 April 2022.
 - The breach of planning control as alleged in the notice is without planning permission, the unauthorised material change of use of the premises shown in the approximate location outlined in red on the plan attached to the enforcement notice, from a shop to a nail salon.
 - The requirements of the notice are to:
 - 1) Cease the use of the premises, shown in the approximate location outlined in red on the plan attached to the enforcement notice, as a nail salon.
 - 2) Make good any damage arising from compliance with step one and remove all debris from the premises.
 - The period for compliance with the requirements is six months.
 - The appeal is proceeding on the grounds set out in section 174(2)(a), (b), (d), (e), (f) and (g) of the Town and Country Planning Act 1990 as amended.
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Appeal B Ref: APP/E5900/W/22/3298440

80 St. Stephens Road, LONDON E3 5JL

- The appeal is made under section 78 of the Town and Country Planning Act 1990 against a refusal to grant planning permission.
 - The appeal is made by Mr P K Huynh against the decision of London Borough of Tower Hamlets.
 - The application Ref PA/22/00133, dated 11 December 2019, was refused by notice dated 30 March 2022.
 - The development proposed is change of use from A1 to sui generis (nail bar).
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Decisions

Appeal A

1. The appeal is allowed, the enforcement notice is quashed and planning permission is granted on the application deemed to have been made under section 177(5) of the Town and Country Planning Act 1990 (the Act) for the development already carried out, namely the material change of use from a shop to a nail salon at 80 St Stephens Road, London E3 5JL as shown on the plan attached to the notice and subject to the following condition:
 - 1) The use hereby permitted shall not be open to customers outside the following times: Mon-Fri 10.00 to 19.00 and Sundays and Bank Holidays 11.00 to 17.00.

Appeal B

2. The appeal is allowed and planning permission is granted for the change of use from a shop (Class E) to a nail salon (*sui generis*) and an extension to the rear at 80 St Stephens Road, London E3 5JL in accordance with the terms of the application reference PA/22/00133, dated 11 December 2019, subject to the following conditions:
 - 1) The development hereby permitted shall not be carried out except in complete accordance with the details shown on the submitted plans all numbered and prefixed with 19:2085:L(2-) as follows: 001 02 01; 002 03 01; 003 04 01; 004 04; 101 05 A; 102 06 01; 103 05 and 104 06.
 - 2) The use hereby permitted shall not be open to customers outside the following times: Mon-Fri 10.00 to 19.00 and Sundays and Bank Holidays 11.00 to 17.00.

Preliminary Matters

3. The Council changed the description of the development in the planning application from that set out in the bullet point above to "Retrospective application for change of use from shop (Class E) to nail salon (*sui generis*) and extension to rear". It is not known whether the appellant agreed to these changes but the reference to Class E Commercial, Business and Service uses, as opposed to Class A1 Retail uses, reflects the September 2020 amendments made to the Town and Country Planning (Use Classes) Order 1987. The plans also show an extension 200mm in depth at the rear of the building.
4. For these reasons I believe it is appropriate to correct the description, in the interests of clarity, as a reference to Class A1 is incorrect and the plans show an extension. It is also necessary to omit the superfluous, as "retrospective" does not describe an act of development. I have therefore considered Appeal B on this basis.
5. I have also considered whether it is necessary to correct the allegation in the enforcement notice, as this forms the description of the development for the deemed planning application. Corrections may only be carried out provided there is no injustice caused to either party. It appears from the appellant's case that they fully understood the allegation but, if I were to add a reference to the former use falling within Class E then injustice may be caused. This is because if the appellant had known the former use of the premises now fell within Class E Commercial, Business and Service use class, they may have chosen to plead other grounds of appeal. For these reasons I have not corrected the allegation.
6. The decision notice lists the plans that accompanied the application but two were omitted when the appeal was submitted. These were subsequently submitted at my request and formed part of my considerations.

The ground (e) appeal

7. Under a ground (e) appeal the onus of proof is on the appellant to show that the enforcement notice has not been served as required by section 172 of the Town and Country Planning Act 1990 (the Act). Section 172(2) states that a copy of the notice shall be served on (a) the owner and on the occupier of the land to which the notice relates: and (b) on any other person having an

interest in the land which, in the opinion of the authority, is materially affected by the notice.

8. The appellant only makes two submissions for this ground of appeal, namely "according to the owner, only a few people read these notices" and "it (the enforcement notice) was late to issue on any business after 19 months". The first point appears to relate to a public notice displayed outside the premises to advertise the planning application and the second point relates to the appeal under ground (d).
9. As there are no submissions that directly relate to the ground (e) appeal and the Council state that the enforcement notice was served on the owner, the occupier and the registered company, I am satisfied that the notice has been correctly served in accordance with section 172(2). The appeal on ground (e) therefore fails.

The ground (b) appeal

10. In appealing on ground (b) the burden of proof is firmly on the appellant to demonstrate that the matter stated in the notice relating to the material change of use to a nail salon has not occurred as a matter of fact.
11. I saw the premises had been furnished, laid out and used as a nail salon at the site visit. I also saw that some shelves displayed items for sale and there were two small treatment rooms at the rear of the salon. The appellant states that, in effect, the primary use is not a nail salon but a mixed use as nail salon, retail and health clinic. However, they provide no evidence to differentiate between customers or to show how the business operates such as how much income is derived from use as a nail salon, sales receipts for items sold and income derived from providing personal health care.
12. The business operates from the ground floor but staff have access to a small mezzanine, which is used as a rest area and for storage. As most of the ground floor is laid out for nail salon work, including several pedicure and manicure stations and a drying area, it seems to me that the primary use is as a nail salon. The limited items for sale amount to an ancillary use due to the restricted display area. Prices are not easily seen so it not obvious whether bottles of polish and other items are for sale and access to the shelves to browse or select is not readily available without having to go behind the manicure stations.
13. Of the two treatment rooms, one appeared to be used for storage. The floor area of the remaining room appears to be less than the pedicure area and as it can only be used for one person at a time, it is my view that use for health or other purposes also amounts to an ancillary use.
14. In the absence of any other submissions or material from the appellant, I conclude that they have not been able to demonstrate that the alleged breach of planning control has not occurred as a matter of fact. The appeal on ground (b) therefore fails.

The ground (d) appeal

15. This ground of appeal is that at the date when the notice was issued, no enforcement action could be taken. The burden of proof in an appeal on this ground lies with the appellant. As such, they need to show, on the balance of

probabilities, that the material change of use to a nail salon began more than ten years before the notice was issued. In addition, that the use continued such that at any time during the ten year period the Council could have taken enforcement action against the use. The relevant date is 21 April 2012.

16. The appellant states that the business was set up in September 2020, which is after the relevant date, and which means it has been in operation for less than the required ten years to satisfy the time limits set out in section 171 of the Act.
17. Prior to Appeal B, the appellant submitted an earlier application in 2019 in which they stated the use had not begun. The Council also submit that the premises were being marketed for sale in 2019 according to the marketing report that accompanied the 2019 application.
18. On the appellant's own admission, the material change of use to a nail salon occurred less than ten years before the issue of the notice. Moreover, the appellant's own evidence supports that admission. Consequently, the appellant has not discharged the burden of proof that the nail salon use has continued such that at any time during the ten year period the Council could have taken enforcement action. The appeal on ground (d) therefore fails.

The ground (a) appeal, the deemed planning application and the section 78 appeal

Main Issue

19. The appeal site lies within the Roman Road East District Centre (the DC). The character of the DC is defined by an historic street market and the appearance of the area comprises in the main small shops with flats above. Policy D.TC2 of Tower Hamlets Local Plan 2031, adopted January 2020, seeks to protect the vitality and viability of the DC.
20. The main issue is therefore whether the use of the premises causes harm to the function and form of the DC.
21. The Council have raised no objection to the inconsequential rear extension or to the effect of the development on the character or appearance of the Roman Road Market Conservation Area and I see no reason to do so either.

Reasons

22. The DC is largely focussed on a section of Roman Road which runs from the junction with St Stephens Road in the west to Parnell Road in the east. The appeal site is a modern unit with residential use above situated adjacent to a public house that marks the entry to the semi-pedestrianised Roman Road, which contains the market.
23. The ground floor area of the appeal site amounts to approximately 57 square metres. The nail bar has a simple shopfront and entrance door which overlook a wide stretch of pavement planted with trees and containing a bench. There are two neighbouring commercial units occupied by a bathroom fittings showroom and a café, all with servicing from the rear. Prior to the nail bar use, the premises were vacant.
24. Policy D.TC2 requires within the primary frontages of DCs, of which the appeal site forms part, that development should contribute to achieving a minimum of

60% of ground floor units as A1 Retail use. The Council submit that the DC was already below this 60% threshold before the policy was adopted and that it is likely the number has declined since the introduction of the new more flexible Class E. Furthermore, there is a concentration of sui generis uses in the vicinity of the appeal site, namely nail bar and beauty salons, which are considered to harm the vitality and viability of the DC.

25. Policy D.TC2 was adopted in January 2020 before the introduction of the new use Class E in September 2020. Although the National Planning Policy Framework (the Framework) published in July 2021 states that planning policies should define primary shopping areas, it is not clear how this takes into account the scope of the new use class. Class E includes the display or retail sale of goods, the sale of food and drink for consumption (mostly) on the premises, the provision of financial and professional services, indoor sport, recreation or fitness, the provision of medical or health services, creche, day nursery or day centre uses amongst other uses.
26. Notwithstanding this, I find that Policy D.TC2 is consistent with the Framework in that overall, the objective of the policy is to protect the form and function of the DC. To that end, when visiting the site, I saw that most of the businesses along Roman Road appear to fall within the new use Class E and that a large supermarket near the old library was a particular draw to pedestrians. The market was also running and there were stalls positioned along the whole length of the DC primarily offering goods for sale.
27. Although I saw a couple of nail bars along and just off Roman Road, in my view it is the considerable number of vacant units that appear to have more of an effect on the vitality and viability of the centre. These vary in size from small units similar in area to the appeal site to much larger premises. Often there are rows of vacant units which, in my view, leads to pedestrians crossing the road to find something more interesting elsewhere and results in occupied units near vacant units being overlooked by pedestrians. I acknowledge the Council's concerns over the loss of a small retail unit, but it has not been demonstrated either how this has diminished the form and function of the area, given the number of vacancies, or how the new use has undermined the diversity of uses in the DC.
28. Most of the nail bars and beauty salons referred to by the Council lie in the secondary frontage area and in my view have little effect on the operation of the primary area. Some are also located quite a distance from the market. Whilst the Council refer to the nail bar use as being outside a use class, it seems to me to be similar to a hairdresser in that it is commonly found in a town or district centre. Like a hairdresser, customers pay for a personal service then often go on to make use of other businesses in the centre, so in that sense it is a complementary use. Furthermore, the proximity of the appeal site to the entrance to the market area lends itself to customers making linked trips.
29. For these reasons I find it has not been demonstrated that the nail bar use results in harm to the form or function of the DC. Rather, the new use has reduced the number of vacant premises and the location of the occupied unit at the entrance to the DC preserves the function of the DC. As such, I see no conflict with Policy D.TC2 and the appeal on ground (a) therefore succeeds.

Conditions

30. I have considered the three conditions suggested by the Council against the advice in the Planning Practice Guidance. The first relating to the commencement of development is unnecessary as the development has already begun. However, in the interests of proper planning, it is necessary though to require that the development is maintained in accordance with the approved plans. In addition, to safeguard the living conditions of neighbouring occupiers, a condition is necessary to control the opening hours of the business. No conditions are necessary for the extension as it is substantially complete.

Conclusions

Appeal A

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

Appeal B

32. For the reasons given above I conclude that Appeal B should be allowed.

D Fleming

INSPECTOR