



Appeal Decision

Site visit made on 22 March 2023

by S A Hanson BA(Hons) BTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 9 May 2023

Appeal Ref: APP/Y5420/C/22/3294283

Ground Floor, 17 High Street, London N8 7QB

- The appeal is made under section 174 of the Town and Country Planning Act 1990 as amended. The appeal is made by Mrs Amber Okonji against an enforcement notice issued by London Borough of Haringey.
 - The notice, numbered UNW/2021/00583, was issued on 27 January 2022.
 - The breach of planning control as alleged in the notice is Without planning permission the erection of a rear canopy extension and the material change of use to a mixed use incorporating restaurant and shisha lounge.
 - The requirements of the notice are to: 1. Cease the use of the premises for shisha smoking. 2. Demolish the rear timber canopy extension in its entirety. 3. Remove from the land any debris resulting from carrying out step 1 and 2 above.
 - The period for compliance with the requirements is: 1 (one) month.
 - 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. Since the prescribed fees have not been paid within the specified period, the appeal on ground (a) and the application for planning permission deemed to have been made under section 177(5) of the Act have lapsed.
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Decision

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

Matters concerning the notice

2. The breach of planning control alleged in the notice refers to operational development and a material change of use. The reasons for issuing the notice provide that the Council considers that four years is the relevant time limit for taking enforcement action. However, although the relevant period is four years for the operational development, it is ten years for a material change of use as set out in Section 171B(3) of the Act. In the absence of an appeal on ground (d), I consider there to be no injustice caused to either party with this error.

Preliminary Matters

3. Planning application ref HGY/2021/3141 for the 'erection of sheltered enclosure at the rear of premises to accommodate a shisha bar with additional seating and smoking area in connection with existing ground floor restaurant' was refused by notice dated 21 February 2022.
4. Matters relating to the planning merits of the canopy structure in the context of the conservation area or the effect of the development on occupants of neighbouring properties are not relevant to an appeal made on grounds (b) or (c). As no appeal is made on ground (a) that planning permission should be granted, I cannot take those matters into account in reaching my decision.

Background

5. The site to which the appeal relates is three-storey end of terrace building, with a restaurant on the ground floor and residential on the upper floors. The premises is located within the Hornsey High Street Conservation Area. The surrounding land uses are predominantly commercial on the ground floor with residential on the upper floors.

Ground (b)

6. An appeal on ground (b) is a legal ground of appeal and is a claim that the matters alleged at Section 3 on the enforcement notice have not occurred as a matter of fact. The appeal concerns the circumstances leading up to, and at the time of the issuing of the enforcement notice.
7. The appellant provides that the 'temporary' structure was erected following the submission of an application for planning permission to erect a canopy with a shisha bar at the rear where customers could smoke. I observed at my site visit that a timber structure had been erected to the rear of the restaurant. The internal space was furnished with banquettes, tables and chairs, there was a TV and there were heaters attached to the walls and artificial plants provided decoration. The structure was accessed internally through the restaurant and also via the gates on the road which runs to the side of the premises.
8. Turning to the material change of use of the premises, the notice alleges a mixed use incorporating a restaurant and shisha lounge. The appellant argues that the use of the site for shisha smoking has not 'effectively started' due to problems with harassment locally. However, the Council has provided, as part of its evidence, an image of a post advertising shisha smoking at the premises, a screenshot of a post from a customer smoking shisha and one of hookah equipment. The images are tagged with the company name 'i.nairobi.london'. I also noted at my site visit that there were two hookahs and a separate selection of pipes stored within the space.
9. From the evidence presented, and on the balance of probabilities, the matters alleged in the notice have occurred as a matter of fact. Consequently, the appeal on ground (b) cannot succeed.

Ground (c)

10. The appeal on ground (c) is a claim that the development does not constitute a breach of planning control. In pursuing an appeal on these legal grounds, the onus firmly rests with the appellant to show, on the balance of probabilities, that the matters stated in the notice, if they occurred, do not constitute a breach of planning control. The gist of the appellant's case is that the canopy is a temporary structure and that it is permitted development.
11. The term 'building operations' is defined for the purposes of the 1990 Town and Country Planning Act in section 55(1A) as including (a) demolition, (b) rebuilding, (c) structural alterations of or additions to buildings, and (d) other operations normally carried on by a person in business as a builder. The list is not exhaustive. Section 55(1) and (1A) should be read with regard to section 336(1) which defines a 'building' as including any structure or erection and any part of a building, but not plant or machinery comprised within a building.

12. Established case law¹ identified three primary factors as being relevant to the question of what was a “building”. These are: (a) size; (b) permanence; and (c) physical attachment. The canopy structure is of timber construction, bolted together, with a solid roof covering. It is attached to the rear and side elevation of the restaurant and a side brick-built boundary wall. The structure is of a size and design which suggests that it cannot easily be moved within the site, and there is no evidence to show that has happened. Overall, the canopy extension displays a sufficient degree of permanence, and I consider that the works carried out to construct it fall within s55(1)(A) of the 1990 Act.
13. The appellant refers to the design being compliant with permitted development. Article 3(1) of the Town and Country (General Permitted Development) (England) Order 2015 as amended (the Order) grants planning permission for the classes of development set out in Schedule 2 of the Order. Within this section, Class A of Part 7 permits some forms of non-domestic extension. However, this does not apply to the appeal development as the site falls within the conservation area. Consequently, express planning permission is required for the canopy structure, and none has been granted.
14. Regarding the alleged material change of use of the premises to a mixed use, there is little evidence on this point from either side and there is no evidence that shisha smoking is or would be ancillary to the restaurant use. Accordingly, the overall use is likely to be sui generis. As to whether it amounts to a material change of use, there is, at the very least, a reasonable likelihood of noise and disturbance in a partly residential neighbourhood, so it is more likely than not to be development requiring express planning permission. The burden of proof to show otherwise is on the appellant and it has not been discharged. It is also of consequence that an application for a shisha use in association with the restaurant was recently refused planning permission.
15. For the reasons given above, the appeal on ground (c) fails.

S A Hanson

INSPECTOR

¹ *Cardiff Rating Authority v Guest Keen Baldwin's Iron and Steel Co Ltd* [1949] 1QB 385, endorsed by the Court of Appeal in *Skerritts of Nottingham Ltd v SSETR (No.2)* [2000] 2 PLR 102