



Appeal Decisions

Site visit made on 26 April 2023

by R Merrett Bsc(Hons) DipTP MRTPI

an Inspector appointed by the Secretary of State

Decision date: 31 May 2023

Appeal A: APP/F5730/C/21/3289998

Appeal B: APP/F5730/C/22/3290107

Johnson House, Coronation Road, Park Royal NW10 7PF

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended by the Planning and Compensation Act 1991.
- The appeals are made by Parklane Management Services Limited (Appeal A) and Johnson's House Limited (Appeal B) against an enforcement notice issued by Old Oak and Park Royal Development Corporation.
- The enforcement notice, numbered 21/0009/ENFOPDC, was issued on 1 December 2021.
- The breach of planning control as alleged in the notice is Without planning permission, the material change of use of the first floor of the Property to a mixed use as a restaurant, shisha café and nightclub (sui generis).
- The requirements of the notice are 1. Cease the restaurant use element; 2. Cease the shisha café use element; 3. Cease the nightclub use element; 4. Remove all material, furniture, fixtures, fittings, equipment and paraphernalia integral to and that facilitate the Unauthorised Development; 5. Remove all kitchen facilities and associated drainage and water connections integral to and that facilitate the Unauthorised Development; 6. Remove from the Property all debris resulting from compliance with the above steps.
- The period for compliance with the requirements is 3 months.
- The appeals are proceeding on the grounds set out in section 174(2) (b) and (c) (Appeal A) and section 174(2) (b), (c), (d), (f) and (g) (Appeal B) of the Town and Country Planning Act 1990 as amended.

Summary of Decisions: The appeals are dismissed and the enforcement notice is upheld, with corrections, in the terms set out below in the Formal Decision.

Preliminary Matters

1. The requirements of the notice should align with and follow logically from the allegation. The enforcement notice alleges a mixed use comprising restaurant, shisha café and nightclub (a single 'sui generis' use). The requirements include ceasing the aforementioned elements as separate primary uses. As such the requirements do not squarely align with ceasing the alleged sui generis mixed use.
2. I am satisfied that the requirements can be corrected accordingly without resulting in prejudice to any of the parties.
3. Appeal grounds (b), (c) and (d) are known as legal grounds of appeal. In this regard the onus rests with the appellants to demonstrate their case on the balance of probability.
4. The appellants have made representations regarding the significance of the loss of industrial floorspace and noise impact; also parking availability and

enforceability. However, for the avoidance of doubt, in the absence of an appeal on ground (a), namely that planning permission should be granted for the alleged development, the merits of the development are not before me for consideration.

The appeals on ground (b)

5. The appeals are that the alleged development has not occurred as a matter of fact. Specifically, it is argued that there is no nightclub and further that planning permission exists for change of use of the premises to a social club and restaurant¹ (which would also allow for a café use). I shall deal with the significance of the previous planning permission in the context of the ground (c) appeal below.
6. As to actual use, it was evident from my visit that the premises comprise a main room at first floor level, with access to toilet facilities. There was an enclosed desk at the entrance to the main room and seating booths and television screens situated around the periphery. A sizable kitchen area, with various cooking, washing and storage equipment and a serving area also occupies part of the first floor of the premises, adjoining the main room. Various foods and soft drinks were being stored. The first floor of the premises, as a whole, is reached via a stair well leading from external doors.
7. The Old Oak and Park Royal Development Corporation (the Corporation) says that whilst there is no definition of 'nightclub' in planning law, The Oxford Dictionary definition refers to an entertainment venue, open from evening to early morning. The definition is not disputed by the appellants and I have no reason to take a contrary view.
8. The Corporation, as part of its evidence, has submitted copies of various social media entries, such as promotional advertisements for events at the premises, known as the 'Wish Lounge', including various live dancers and performers. There are also reviews and photographs, posted by patrons on social media platforms relating to these activities, and appearing to show groups of people socialising and partying.
9. On what appears to be the venue's social media account reference is made to the availability of hot food, events and shisha. There is also reference to opening times from early evening until the early hours of the following morning. The reviews contain references to the smoking of shisha. There is also a photograph of a shisha pipe being smoked by somebody who appears to be a patron of the venue.
10. The appellants, within their evidence, do not dispute that the various social media entries relate to the appeal site. Indeed, one of the entries references the appeal site address. During my visit, I noted several pictures displayed on the walls of the premises incorporating logos of the word 'Wish', thus further corroborating this link. It is also apparent, when comparing my observations of the design of the main room, including the position of windows, with photographs on social media that the entrance desk area appears to double as a DJ booth. The appellants do not provide any counter evidence as to how the day to day business operates in practice. I have no reason to doubt that the various social media entries relate to the appeal site.

¹ Ref 9384/4 – dated 24 August 1983

11. Drawing the above considerations together, it seems to me that the Corporation's evidence serves to contradict that of the appellants'. The appellants' case is not therefore made out on the balance or probability. Furthermore, there is a lack of evidence to rebut the allegation of a mixed use, that is to say that those uses respectively were primary uses, rather than a use incidental to one of the other alleged uses. I therefore conclude, on the balance of probability, that at the time the notice was served the premises comprised a mixed use as a restaurant, shisha cafe and nightclub. Accordingly the appeals on ground (b) fail.

The appeals on ground (c)

12. The appeal is that those matters, if they have occurred, do not constitute a breach of planning control. The appeal site is a two-storey building, which is undisputed to have formerly been in industrial use. The appellants rely on the aforementioned planning permission to support the case that the alleged use is not in breach of planning control.
13. That planning permission granted consent for the use of the building as a social club and restaurant. However, attached to the permission was a condition requiring the development to be commenced within 5 years of the date of the permission. Therefore a key consideration is the question of whether the planning permission was actually commenced. In this regard there is an absence of evidence that the permission was implemented at all, let alone any evidence that these uses had continued for a period of 38 years, as indicated by the appellant (Appeal A).
14. Notwithstanding this, if the permission was implemented it would still be necessary for the appellants to demonstrate that changing from a social club and restaurant to the alleged mixed use would not in itself involve a material change in the use of the land. For a material change of use to have occurred there must be some significant difference in the character of the activities from what has gone on previously as a matter of fact and degree. Off-site effects may be highly relevant to whether there has been a material change of use or not.
15. It seems to me that the distinctive characteristics of a nightclub use would include the congregation, comings and goings of clientele late at night and noise generated from within the venue resulting from various forms of entertainment that might take place there. This type of use would have the potential to result in disturbances to or within the surrounding area, with implications for security arrangements and policing late into the night. There is no evidence before me to demonstrate that if the building was previously used as a social club and restaurant, that it operated in a similar way to the restaurant, shisha café and nightclub subject to this case, drawing groups of clientele for late night entertainment.
16. In terms of shisha smoking, this would involve the storage and preparation of specialist equipment. It would also possibly result in clientele movement patterns later at night, and therefore necessitate different security arrangements, when compared with a restaurant and social club, or indeed a traditional form of café.
17. Drawing these considerations together I therefore consider, as a matter of fact and degree, even if the previous planning permission for a social club and

restaurant had been implemented and remained extant (which I am not persuaded is the case), there is no evidence presented to demonstrate that the alleged mixed use did not result in a material change of use to the premises. From this perspective I therefore conclude, on the balance of probability, that the commencement of the restaurant, shisha café and nightclub use would have resulted in the material change of use of the premises.

18. Furthermore, and assuming the planning permission was implemented in time, it seems to me that the permission related to the whole building (the description does not say otherwise), rather than just the first floor, as is the focus of the development in this case. The Council has referred in its evidence to previous lawful development certificate and prior approval applications relating to the premises, in 2014 and 2016 respectively². The officer reports, relating to those applications, referred to both floors of the premises being occupied by a single business, as corroborated by external advertisement signage on the building. This suggests that at that time the ground and first floor areas of the premises were not physically segregated as is the case now. In this context, there is no evidence to persuade me that the alleged development did not result in a material change of use of the premises, as a matter of fact and degree, due to the sub-division of the planning unit.
19. The appellants further argue that the building was formerly used for light industrial / office purposes (formerly Use Class B1) and that as such it could be used as a restaurant, without the need for express planning permission, as all of these uses now fall within the same Use Class E of The Town and Country Planning (Use Classes) Order 1987 (UCO).
20. Article 3(1) of the UCO as amended provides that where a building or other land is used for a purpose of any class specified in the Schedule, the use of that building or that other land for any other purpose of the same class shall not be taken to involve development of the land. This means that a change of use within a single use class does not involve development and therefore does not require planning permission.
21. The notice alleges that there has been a material change of use to a mixed use comprising restaurant, shisha café and nightclub. A mixed use, of this nature, is a single mixed use and thus is 'sui generis', meaning that it falls outside the definition of any of the use classes specified in the Order. Accordingly, it would not benefit from the operation of Article 3(1) of the UCO as relied on by the appellants.
22. Even if the appeal site was simply being used as a restaurant, which for the above reasons I am not persuaded that it is, it would still be necessary to demonstrate that the lawful use of the appeal site fell within Use Class E, which includes light industrial and office uses, formerly classed as B1. The appellants have provided no significant evidence to this effect. Whilst the aforementioned planning permission indicates the existing use of the building at that time as 'offices and industrial' it is not clear whether this related to a general industrial use which would have been outside Use Class B1; and whether the office use formed any primary, rather than incidental, use of the building.
23. By contrast the Corporation has submitted evidence as part of its statement, indicating that at different times in the intervening years the building has

² Ref PP/2014/0173 – refused 13 March 2014; and Ref 163849OPDCPA – refused 3 October 2016

accommodated what could be various general industrial uses. The evidence includes Google Street View imagery, Companies House records, property consultant information and officer site visit reports and photographs. These variously indicate the existence of a jewellery developer and supplier prior to 2009; a printing business prior to 2012 and a wood joinery business occupying the entire building in 2014. This at least indicates that the appeal site has accommodated uses unrelated to Use Class E at various times since the aforementioned planning permission was granted.

24. The appellants have not therefore demonstrated, on the balance of probabilities, that there has not been a breach of planning control because of the provisions of the UCO. No further information has been supplied to demonstrate that, on the balance of probabilities, the development as alleged would not have comprised a material change of use of the premises that required express planning permission.

25. For the above reasons the ground (c) appeals therefore fail.

Appeal B on ground (d)

26. The ground of appeal is that at the date when the notice was issued, no enforcement action could be taken in respect of any breach of planning control. In order to succeed on this ground, in accordance with Section 171B(3) of the Act, it would be necessary for the appellant to show, on the balance of probability, that the alleged mixed use of the site had commenced at least ten years before the notice was issued, that is by 1 December 2011, and had continued in such use over a ten-year period. It must be shown that there has not been any significant interruption in the use, in order to demonstrate the necessary continuity. If this cannot be shown then the use would not be immune from enforcement action.

27. The Corporation, as part of its statement, has submitted a Planning Contravention Notice, completed by the appellant. Within this document the appellant confirms that they started operating from the unit on 1 February 2021. There has been no further evidence presented to persuade me, on the balance of probability, that the alleged mixed use has continued on the site prior to that date and for a minimum period of ten years, in accordance with the requisite immunity period. Indeed the Corporation's evidence indicates the existence of the aforementioned wood joinery business at the appeal premises in 2014 (as referred to at paragraph 23 above). The ground (d) appeals therefore fail.

Appeal B on ground (f)

28. The ground of appeal is that the steps required by the notice to be taken are excessive. With regard to the unauthorised change of use the objectives of the notice are to discontinue the use of the land and to restore the land to its condition before the breach took place. It follows that the purpose of the notice is to remedy the breach of planning control.

29. As set out earlier in the decision letter, the requirements of the notice include separately ceasing the individual elements of the breach, as separate primary uses. However this can be corrected without resulting in injustice.

30. In support of the appeal, the appellant refers to the lack of existing planning conditions restricting parking and noise levels, and the site not being in a

recognised residential neighbourhood. These considerations, however, are concerned with the merits of the development. In the absence of a ground (a) appeal, namely that planning permission ought to be granted, they do not therefore carry weight in support of the development.

31. Given that the purpose of the notice is to remedy the breach of planning control, this can be achieved by discontinuance of the use of the land and its restoration to the condition it was in before the breach took place. There is no evidence before me to suggest that the kitchen in its present form, or various items facilitating the present unauthorised use, facilitated any previous lawful use of the appeal site. The requirements to remove various items, facilities and connections that facilitate the unauthorised development would therefore reasonably fall within the scope of the notice purpose. To require these measures does not, therefore, exceed what is necessary and the appeal on this ground must fail, with the exception of the correction warranted, as referred to above.

Appeal B on ground (g)

32. The appeal on ground (g) is that the time given to comply with the notice is too short. I am mindful of the importance of striking a balance between enforcement that is intended to be remedial rather than punitive, whilst maintaining public confidence in the planning system. However, whilst the appellant has requested that the compliance period be extended to 9 months, due to existing employment and supply chain commitments, alongside the required physical interventions, they have not provided any more details of existing contracts to support and justify this request.
33. The three-month compliance period, given by the Corporation, does not stand out as being patently unreasonable within which to cease the unauthorised use and undertake the various requisite physical works. I therefore have no reason to doubt that this would be a proportionate measure, whilst also having regard to human rights considerations. The ground (g) appeal therefore fails.

Conclusion

34. For the reasons given above, I conclude that the appeals should not succeed. I shall uphold the enforcement notice with corrections.

Formal Decisions

35. It is directed that the enforcement notice is corrected by:

Deleting the wording in requirements 1., 2. and 3. of Schedule 5 in its entirety, and substituting the following wording instead:

"1. Cease the mixed use as a restaurant, shisha café and nightclub (sui generis);" and

Renumbering requirements "4.", "5." and "6." as "2.", "3." and "4." respectively.

36. Subject to the corrections, the appeals are dismissed and the enforcement notice is upheld.

R. Merrett INSPECTOR