



Appeal Decisions

Site visit made on 21 August 2023

by H Davies MSc MRTPI

an Inspector appointed by the Secretary of State

Decision date: 06 September 2023

Appeal A Ref: APP/W1850/C/22/3309047

Appeal B Ref: APP/W1850/C/22/3309048

St Katherine's Barn, Ledbury, Herefordshire, HR8 1EA

- The appeals are made under section 174 of the Town and Country Planning Act 1990 as amended.
- The appeals are made by Mrs Lynn Jones (Appeal A) and Mr Robin Oakey (Appeal B) against an enforcement notice issued by Herefordshire Council.
- The notice was issued on 13 September 2022.
- The breach of planning control as alleged in the notice is without planning permission the material change of use from a mixed use of gallery and café to mixed use gallery, café, drinking establishment and live music venue.
- The requirements of the notice are to cease the use of the building as a drinking establishment and venue for live music.
- The period for compliance with the requirement is 28 days from the date the notice takes effect.

Appeals A and B are proceeding on the grounds set out in section 174(2) (b) and (c) of the Town and Country Planning Act 1990 as amended.

Decision

1. The appeals are allowed, and the enforcement notice is quashed.

Preliminary Matters

2. I am informed that a statutory noise nuisance notice was served on the site, known as The Barn, by the Council Environmental Health team in October 2019 and there were licencing issues around the same time. I note that The Barn remains subject to the requirements of the statutory noise nuisance notice, which has not been breached, and is licenced for music and alcohol from Monday to Sunday 10:00-22:30. Any issues regarding compliance with these matters would need to be dealt with under the appropriate powers, which are outside the scope of planning legislation and are not the subject of this appeal.
3. Securing a licence for music and alcohol does not override the need for planning permission, should permission be required.
4. I note the range of letters of support which have been submitted from customers, as well as artists and musicians involved with The Barn. However as there is no appeal on ground (a), planning merits are not considered under this appeal.

The appeals on ground (b)

5. An appeal on ground (b) is that the matters stated in the notice have not occurred. The matters stated relate to use of The Barn for the sale of alcohol and playing of live music. The appellants do not deny that this has occurred. Therefore, the appeal on ground (b) fails.

6. Arguments made in appeal submissions by the appellants and the Council overlapped to an extent regarding ground (b) and (c). Some of the information provided for ground (b) relates to whether a material change of use has occurred which would constitute a breach of planning control. This is more pertinent to the appeals on ground (c) so is considered below.

The appeals on ground (c)

7. An appeal on ground (c) is that the matters alleged, if they occurred, do not constitute a breach of planning control. The matter alleged is without planning permission a material change of use from a mixed use of gallery and café to a mixed use of gallery, café, drinking establishment and live music venue.
8. The Barn has planning permission for use as a gallery and café. From the appeal submissions and my site visit I am content that it is a single planning unit, and the lawful primary uses are a mixed use consisting of a gallery and café.
9. In accordance with Section 55(1) of the Act, development includes the making of any material change in the use of any buildings or other land. If the alleged material change of use has taken place at The Barn, this would constitute a breach of planning control as planning permission has not been granted. Therefore, I need to consider, as a matter of fact, whether a material change of use has taken place. The onus of proof is on the appellants and the relevant test is the balance of probability.
10. While the meaning of 'use' is provided in s336(1) of the Act, the concept of a 'material change of use' is not defined in statute. Case law has established the basic approach that for a material change of use to have occurred, there must be some significant difference in the character of the use of the land from what has gone on previously. The assessment is a matter of fact and degree, for the decision maker to determine on the available evidence.
11. The appellants have provided information, including an affidavit, about the use of The Barn. They do not deny that alcohol is sold, and live music is played, but contend that this is not a material change of use. They state that The Barn is used as an art gallery and café, open Tuesday to Saturday in summer and Friday and Saturday only in winter. It closes at 5pm, except on Saturdays when it is generally closed by 8pm, with a few occasions extending to 10.30pm. Appellant figures show that alcohol sales form a minor part of overall café activity, and live music has taken place on Saturday afternoons and early evening, with infrequent events running later, but only while the café and/or gallery are open. The Council has not challenged the appellant information regarding the scale and frequency of alcohol sales and live music.
12. On the basis of the evidence before me, I consider the scale and frequency of alcohol sales and playing of live music to be functionally related to the primary gallery and café uses, but not integral to or part and parcel of them. Therefore, the sale of alcohol and playing of live music can be considered incidental to the primary uses, rather than as separate and additional primary uses. The primary uses have not changed.
13. The planning consequences of a change to the way a site is used may be relevant in determining if that change is material or not. Complaints have been received about noise, primarily from one nearby resident, which resulted in a

statutory noise nuisance notice. While this may indicate that there have been incidents that impacted on the amenity of surrounding residents, it does not necessarily amount to a material change of use.

14. During my site visit it was evident that The Barn is within the commercial centre of town, near the main shopping street. The adjacent Feathers Hotel has an outside drinking and eating area and the site is in close proximity to the main town car park, public outside space, library and other commercial, leisure and entertainment uses. As such, the general level of noise and activity which residents will experience in this area is quite different to a primarily residential area. Any change in noise and activity at The Barn, and any resulting impact on residential amenity, needs to be considered within this context. With this in mind, the sale of alcohol and playing of live music at the site, on the scale and frequency described in submissions, would not result in a significant difference in the character of the use of The Barn from what has gone on previously.
15. I conclude that on the balance of probability, while the sale of alcohol and playing of live music has occurred at The Barn, it is incidental to lawful primary uses and does not result in a significant difference in the character of the use of The Barn. Consequently, a material change of use from a mixed use of gallery and café to a mixed use of gallery, café, drinking establishment and live music venue has not taken place and therefore, those matters alleged in the notice do not constitute a breach of planning control. Accordingly, the appeal on ground (c) succeeds.

Conclusion

16. For the reasons given above, I conclude that the appeals should succeed on ground (c) and the enforcement notice will be quashed.

H Davies

INSPECTOR